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Supreme Court, U.S.
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No. 92-

In The

Supreme Court of the United States

October Term, 1992

WILLIAM L. COMER FAMILY EQUITY PURE TRUST;
AMERICAN WAY TRUST;
FINANCIAL FREEDOM CONSULTANTS,
OSA DEVELOPMENT COMPANY;
BURICA DEVELOPMENT COMPANY,

Petitioners,

v.

INTERNAL REVENUE SERVICE, and
UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are:

1. Whether the Court erroneously held that the IRS's levies and seizures did not violate the Statute of Limitations?

2. Whether the Court's findings of fact were supported by the required substantial evidence?

3. Whether the Court's holding that some of Petitioners were not properly before the court was contrary to fact and law?

4. Whether the Court's findings and conclusions that the Petitioners should have anticipated the new issues and allegations made by the IRS at or after trial constituted an abuse of discretion, was prejudicial to Petitioners and violated their Fifth Amendment and Constitutional Due Process rights?

5. Whether the Court erroneously held Petitioners to be liable for taxpayers' tax liabilities when Petitioners were never charged with violation of any State or Federal statutes?

6. Whether the Court's conclusion that Petitioners were alter egos of taxpayers because family members were the trustees and beneficiaries is contrary to State and Federal law?

7. Whether the Court's findings and conclusions that Petitioners were liable and alter egos based upon insolvency and fraudulent conveyances, which were not alleged until after trial, were contrary to State law, prior determinations of the Sixth Circuit and the prior determinations of other Circuits?

8. Whether the Court's erroneously held that the IRS was not bound by the doctrines of estoppel, elections and res judicata based upon prior Stipulated Agreements with Petitioners?

9. Whether the Courts holding creates square conflicts: (a) with the holdings of another federal court of appeals; (b) with the holdings of the State of Michigan's courts; (c) with prior decisions of this Court; and (d) sanctions widespread departure from such courts by the District Court, thus requiring the exercise of this Court's power of supervision to avoid a miscarriage of justice?

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No.

In The

Supreme Court of the United States

October Term, 1992

WILLIAM L. COMER FAMILY EQUITY PURE TRUST,
AMERICAN WAY TRUST,
FINANCIAL FREEDOM CONSULTANTS,
OSA DEVELOPMENT COMPANY,
BURICA DEVELOPMENT COMPANY,
Petitioners,

v.

INTERNAL REVENUE SERVICE, and
UNITED STATES OF AMERICA,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners William L. Comer Family Equity Pure Trust, American Way Trust, Financial Freedom Consultants, Osa Development Company and Burica Development Company, by their undersigned counsel, respectfully petition for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit *(App. A, 1-5)* is unpublished. The Court of Appeals' denial *(App. D)* of Petitioners' Motion for Reconsideration is unreported. The opinion of the United States District Court *(App. B, 1-18)* is reported at 732 F.Supp. 755. The final judgment of the District Court *(App. C)* is unpublished.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on June 22, 1992 *(App. A, 1)*, and a timely motion for reconsideration was denied on July 30, 1992 *(App. D)*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS, RULES AND REGULATIONS

1. The **Fifth Amendment** to the United States Constitution provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property without due process of law . . . .

2. **Section 6502(a)** of the Internal Revenue Code provides in pertinent part:

> Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy . . . but only if the levy is made
>
> (1) within 6 years after the assessment of the tax . . .

3. **Section 6322** of the Internal Revenue Code provides in pertinent part:

> [T]he lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed . . . is satisfied or becomes unenforceable by reason of lapse of time.

4. **Section 6335(a)** of the Internal Revenue Code provides in pertinent part:

> As soon as practicable after seizure of property, notice in writing shall be given by the Secretary to the owner of the property . . .

5. **Section 566.12** of the Michigan Compiled Laws provides:

> A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured.

6. **Section 566.17** of the Michigan Compiled Laws provides in pertinent part:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to . . . defraud either present or future creditors, is fraudulent as to both present and future creditors.

7. **Section 600.5813** of the Michigan Compiled Laws provides:

> All other personal actions shall be commenced within the period of 6 years after the claims accrue and not afterwards unless a different period is stated in the statues.

8. **Rules 9(b)** and **(f)**, Federal Rules of Civil Procedure, provide in pertinent part:

> **(b)** In all averments of fraud . . , the circumstances constituting fraud . . . shall be stated with particularity.
>
> **(f)** For the purpose of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter.

9. **Sections 301.7701-4(a)** and **(b)** of the Treasury Regulations are provided in the Appendix, at *F-24,* in their entirety.

10. **Sections 671-677** of the Internal Revenue Code specify when the income (or ownership) of a Trust may be attributed to the Grantor, and, **Section 671(a)** provides, in pertinent part:

> No items of a trust shall be included in computing the taxable income and credits of the grantor or of any other person solely on the grounds of his dominion and control over the trust . . .

11. **Section 449.28** of the Michigan Compiled Laws, provides in pertinent part:

> On due application to a competent court by any judgment creditor of a partner, the court . . . may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; . . .

STATEMENT OF THE CASE

This case presents a fundamental and recurring issue today in the administration of the federal income tax laws - namely, what laws and principles should be applied in determining whether third parties, such as petitioners, may be deemed alter egos of the taxpayers. As the statutes and cases hereinafter discussed illustrate, the context in which this issue arises affects a multitude of taxpayers who have established family and business trusts for estate planning and business purposes for the benefit of their children.

It would be extremely difficult to find a case where key overall facts were more misconstrued or basic laws more ignored than in the instant action. The District Court's decision was based primarily on new allegations and theories raised by the Internal Revenue Service in its amended post-trial brief, and, is: (a) contrary to the weight of documented and testimonial evidence submitted to the court; (b) contrary to both State and Federal law; (c) in conflict with the holdings of other Circuits; and (d) constituted an abuse of discretion which violated Petitioners' Due Process and Fifth Amendment rights. The decision is already being quoted by the IRS as a new avenue of attack on legitimate trusts utilized for estate planning purposes.

1. *Material Facts.* On January 17, 1975, taxpayer William L. Comer ("W. Comer"), as the grantor, and Myra L. Comer ("M. Comer") and Phyllis Carrow, as trustees, established the William L. Comer Family Equity Pure Trust ("Comer Trust") *(D.Ex. 6),*[1] and, on January 24, 1975 he was also appointed a trustee. *(TR. 34)* W. Comer transferred to the trust real estate, certain personal assets and his dried food business (involving 12 sales representatives) *(D.Ex's. 7-11; TR 10-12, 49, 43)* conducted under the name of Constitution Enterprises and operated from the transferred premises ("3261 Property"). *(TR 12, 151)* On April 2, 1975 W. Comer executed irrevocable documents restricting his relationship to the Trust *(R.3: Ex. M; TR*

1 "D.Ex." references are to Defendants' Exhibits. "TR." refers to the Trial Transcript. "P.Ex." references are to Petitioners' Exhibits. "R.," "R.3 Ex." and "R.3 Aff." references are to Petitioners' Exhibits and Affidavits attached to the Complaint and/or filed with the District Court. "AB" references are to Petitioners/Appellants' Brief. "ARB" references are to Petitioners/Appellants Reply Brief. "ABr." references are to Defendants' Brief of March 10, 1992.

153) and, on May 17, 1976, the Comer Trust was amended to insure that it was irrevocable. *(D.Ex. 12; TR 60)* The beneficiaries of the Comer Trust were the Comer's four children and a tax-exempt foundation. *(TR 29, 79-82)*

After the January 1975 conveyances to the Comer Trust, W. Comer still personally owned a 1974 Ford Thunderbird, 1974 Dodge Maxi-Van, 1935 Buick antique coupe, 1957 Pontiac classic coupe, several firearms, a personal checking account, and other personal effects. *(TR 47, 44, 55, 59, 74, 126, 138)*

The original Comer Trust instrument was not a conveyance document and the assets it received were conveyed under separate deed, assignment of land contract and bill of sale. *(D.Ex's. 7-11; TR 10-12, 49, 43)* While this instrument stated that the trustees' "purpose" was to receive assets including the "exclusive use" of W. Comer's "lifetime services," *(D.Ex. 6; TR 37)* W. Comer testified that: (a) this did not "mean that in the conventional sense" because he "didn't work for" anyone else and that his income came "originally from the Family Trust for running the Constitutional Enterprises business" *(TR 37-38, 14);* (b) he had "employment contracts with everyone (he) did work for", including the Comer Trust *(TR 14, 19, 95-96);* and (c) after the Comer Trust was "amended in '80" any such agreement was void "because the Courts . . . ruled you can't convey lifetime services to a Trust, so it's not a valid contract". *(TR 38)* W. Comer also testified that his compensation was based upon what the trustees "figured (he) was worth for the amount of time (he) was putting in" managing the Trusts' business activities and was kept on the low side so as not to "violate (his) fiduciary responsibility", and, that there was a "reduction in (his) compensation" and "there wasn't anybody" else who would work as many hours for such compensation. *(TR 90, 92)*

On October 30, 1976, to reduce its liability exposure, the Comer Trust created TRYE-A Trust ("TRYE") (an irrevocable business trust, previously operated as a d/b/a), transferring to TRYE its sales business including marketing agreements with 90 sales representatives *(D.Ex's. 13, 14; TR 61-63, 65-67, 80; TR 17, 62),* with the Comer Trust as TRYE's sole beneficiary. The Comer Trust's premises were then leased to TRYE. *(TR 51-52)*

On December 1, 1978, the trustees for the Comer Trust purchased real property at 9260 Colonville Rd ("9260 Property"), subsequently constructing new facilities on such premises. *(D.Ex.*

19; R.3: Ex's. T-Z; TR 12-13, 20, 76-77) On January 1, 1980 TRYE terminated its lease for the 3261 Property and executed a new lease for the 9260 Property. *(D.Ex. 20; TR 78-79, 81)*

On August 19, 1990, the County Probate Court Ordered an amendment of the Comer Trust instrument. The amendment was executed by the Trust's grantor, its trustees and all adult beneficiaries and provided that it: (a) did "not create a new Trust"; (b) did "not defeat the rights of any present OR future interests of any of the beneficiaries"; (c) was "to further provide additional restrictions as to (W. Comer)"; (d) "supersedes and takes full precedent over" the original trust instrument. *(D.Ex. 22; TR 95, 103-104)*

On July 5, 1980, William Roy Comer ("W. R. Comer"), the Comers' son, executed a written Acceptance as a co-trustee of the Comer Trust. *(D.Ex. 16; TR 71)* On January 2, 1982, W. Comer resigned as a trustee. *(R.3: Ex. R; TR 10, 14)* On Dec. 1, 1982, the Comer's son Scott C. Comer ("S. C. Comer") was appointed as co-trustee of the Comer Trust. (R.3: Ex S; TR 14)

On August 27, 1980, the Probate Court Ordered the amendment of TRYE's trust instrument (which contained provisions similar to the Comer Trust), said amendment being executed by the Comer Trust as grantor, its trustees, and the Comer Trust as TRYE's sole beneficiary. *(D.Ex. 24; TR 103-105)*

On September 19, 1981, the trustees for the Comer Trust sold part of its 3261 Property to B. Benchley *(D.Ex. 25; TR 105)*, and, on May 14, 1982 the Comer Trust's remaining 3261 Property was sold to C. Koehn. *(D.Ex. 30; TR 19, 113-114)*

For the years 1972-1974, the Comers were required to pay little or no taxes. *(R.3: Ex's. EE, FF, GG)* The purpose of the Comer Trust was to protect its assets for their children (who regularly received distributions) *(R.3 Aff.; R.3: Ex's HH-LL)*, by avoiding probate, death taxes and joint ownership problems. *(TR 11, 35)* Its expenses consisted of land contract and mortgage payments, real estate taxes, and liability insurance. *(TR 15, 145-147)*

On January 18, 1977, W. Comer, as Grantor, with M. and W. R. Comer, as trustees, established the American Way Trust ("American") (a Michigan business trust) *(D.Ex. 15; TR 68-69)*, with the Comer's four children as the primary beneficiaries and who regularly received distributions from American. *(R.3 Aff.; R.3: Ex's. RR-VV, YY-ZZ; TR 36)* On January 19,

1977, W. Comer was appointed as a co-trustee of American. *(TR 72, 75; R. 37, No. 14; D.Ex's. 18, 16, 23; TR 10; R.3: Ex. WW)*

On January 19, 1977, W. Comer conveyed to American a 1977 Buick Riviera, a 1977 Dodge Van, and a personal note for $5,378.40 representing a lien against said vehicles. *(D.Ex. 17; TR 73)* On January 19, 1977, by written agreement American leased to TRYE these vehicles for a fair monthly fee. Various vehicles were ***subsequently*** purchased by American, and then leased to TRYE and Financial Freedom Consultants ("FFC"). *(D.Ex. 18; TR 74-76; R.3: Ex's. RR-VV; TR 17, 69, 149)* Family members were prohibited from driving any business vehicles. *(TR 151)* W. Comer always maintained a personal vehicle, in November 1980 leasing a 1974 Mustang from American to replace his 1974 Thunderbird and in January 1984 leasing a 1979 Oldsmobile to replace the 1974 Mustang. *(TR 135-136, 152, 124, 126-127, 138)*

While W. R. Comer was an initial trustee of American, he resigned shortly after its creation *(TR 72)*, but, was reappointed as a co-trustee on July 5, 1980. *(D.Ex's. 16; TR 102)* On June 1, 1981, W. Comer resigned as a trustee of American *(D.Ex's 16; TR 10)*, and, on December 1, 1982, S. C. Comer was appointed as a co-trustee of American. *(D.Ex's. 16)*

American was created for the express purpose of establishing an auto leasing entity for the benefit of the Comers' children and to reduce the family's liability exposure due to W. Comer's extensive business travels. *(TR 16, 69)*

On August 27, 1980, the Clare County Probate Court issued an Order approving the amendment of American's trust instrument and which contained provisions similar to the Comer Trust, said amendment being executed by American's grantor, its trustees, and its adult beneficiaries. *(D.Ex. 23; TR 102-104)*

The 1980 amendments to the three Trusts involved a restatement of each entire trust instrument and did ***not*** provide that W. Comer would become the sole beneficiary. Under Order of the Probate Court, the trusts were amended on the basis that they did "not defeat the rights of any present OR future interests of any of the beneficiaries" and did "provide additional restrictions as to" W. Comer. *(D.Ex's. 22, 23, 24; R.3 Aff's; TR 103-104)*

On February 1, 1982, W. Comer, as grantor, with W. Comer and S. C. Comer as trustees, created FFC, a business

trust, *(D.Ex's. 28-29; TR 108, 112-113)* for the purpose of publishing and distributing a book entitled "Avoiding the High Costs of Dying." *(R.3 Aff.; TR 16-17, 80)* The sole beneficiary of FFC was the Comer Trust. *(D.Ex's 28; TR 110-111)*

W. Comer always executed written Employment Agreements governing his compensation with each entity, whether the Comer Trust *(TR 14, 19, 95-96)*, TRYE *(D.Ex. 21; TR 87, 89, 91, 93-94)* or FFC *(TR 26, 89-90, 94)*, for the business sales and distribution services he, aided by others, rendered to such trusts.

Each trust: (a) obtained its own taxpayer identification number; (b) filed its own income tax returns *(D.Ex's. 34-43; R.3: Ex's. T, RR-VV, YY-ZZ, BBB-DDD; TR 12, 18)*; (c) maintained its own bank account and financial records *(D.Ex's. 32; R.37; TR 14, 47-48, 66, 113, 120-121)*; (d) conducted business and made investments under its own name *(D.Ex's. 18-20, 27, 30-32; R.3: Ex's. T-Z, RR-VV, BBB-DDD, GGG, JJJ, KKK; TR 105, 107, 113-114, 116, 120-121, 148)*; (e) obtained loans in its own name *(D.Ex's. 31; TR 151-152)*; and (f) FFC maintained its own telephone. *(TR 123)* Newly appointed trustees were added, and resigning trustees deleted, from the appropriate trust accounts, as applicable. *(D.Ex's. 32; R.3 Aff.; TR 14, 47-49)* W. and M. Comer always maintained separate personal records and bank accounts. *(TR 47-49)* Lenders occasionally requested that W. Comer, just as with corporations, serve as a co-signor on some trust loans. *(D.Ex. 31; TR 120)* All trust instruments stated that they were irrevocable and could not be altered. W. Comer's sole relationship with all trusts was in a fiduciary capacity. *(R.3: Ex's. M; D.Ex's. 12, 22-24; TR 13-14, 23, 60, 95, 102, 104-105, 152-153)* Since 1976, the Comer Trust's premises, including furnishings, were always leased to TRYE *(D.Ex. 20; TR 78-79, 81)* or FFC *(TR 51-52, 81, 109, 152)* for business purposes. The Comer Trust did not provide its premises rent-free to the Comer's nor did any Trust pay his or his family's personal or automobile expenses. *(TR 14-15, 18-19, 25, 135-136, 151-152)*

Osa Development was created as a Michigan Limited Partnership funded by 20 investors, with W. Comer and David Bennett as trustees for Osa Explorations, a Michigan business trust serving as General Partner. *(R.3: Ex's. EEE, FFF, GGG)* Burica Development was established as a Michigan Limited Partnership also funded by 20 investors, with W. Comer and David Bennett as trustees for Burica Explorations, a Michigan

business trust serving as General Partner. W. Comer held no financial interest in Osa or Burica. *(R.3: Ex's. HHH, III, JJJ, KKK)* Plaintiffs' amended Complaint stated that Osa and Burica were "separate legal entities" and the owners of their seized "bank accounts". *(R. 15)* IRS agreed that all properties levied upon were "titled or held in the names of . . . Plaintiffs." *(R. 28; D.Ex. 32)* Shortly after seizure Osa and Burica's bank accounts, the IRS issued notices that its 3-year audits of such limited partnerships were completed and that their income tax returns were being accepted as filed. *(R.3 Aff's.)*

For the years 1976-83, the IRS executed stipulated decisions with the U.S. Tax Court that the Petitioners were not liable for any additional taxes. *(R.45; TR 20-21; R.3: Ex's AA-DD, WW-XX; P.Ex's. 60, 61)* Taxpayer's only outstanding liabilities at issue were for the years 1976-80, 1985. *(D.Ex's. 56, 57)*

On October 19, 1984, the Comer's were served by the IRS with a lien (recorded at the County Recorder's Office) for the years 1977-1979, and which listed the assessment dates as: 7-17-78 for 1977; 7-23-79 for 1978; and 7-28-80 for 1979. *(P.Ex. 1; TR 24)*

On February 12, 1987, the Comer Trust was served with a Levy and Notice of Seizure on its 9260 property, and, the Farwell Bank and Great Lakes Savings & Loan were served with Notices of Levy on Petitioners' bank accounts. *(D.Ex's. 56, 57)* The levies and seizures, Interrogatories and Joint Pretrial Order executed by IRS listed the ***sole*** issue as being whether Petitioners were "transferees, nominees or alter egos" of the taxpayers. *(R. 17; D.Ex's. 56, 57; R. 28; R. 35; R. 37; Jensen at TR 3-5; Clark at TR 6, 9)* The IRS also declared that it was not challenging "the validity of the formation of the trusts and partnerships under Michigan law." *(R. 35; R. 37)* Despite Petitioners' request, IRS refused to "identify the case ruling and regulations relied upon to establish Plaintiffs as nominees, transferees and/or alter egos" of the taxpayers. *(R. 28)*

2. *The Decisions Below - The District Court.* After trial held on June 14, 1989, without notes or a Trial Transcript *(ARB, Ex. R)* on February 16, 1990 the district court upheld IRS' allegation of alter ego status on the basis of the following summarized findings of fact and conclusions of law: (a) the Comer Trust instrument conveyed W. Comer's "lifetime services" and all of his "earned remuneration" to the trust; (b) under the

August 1980 Probate Court ordered amendments, W. Comer became the "initial sole beneficiary of the [three] trust[s]"; (c) one trust amendment, one building lease, one auto lease and one employment agreement were improperly signed *(App. B at 10-11);* (d) Burica and Osa Development Companies failed to present evidence of "any interest in levied-upon property" *(App. B at 14),* (e) conveyances to the Comer Trust were made "with actual intent [to] . . . defraud either present or future creditors" *(App. B at 15),* after which "the Comers were for all intents and purposes, insolvent" *(App. B at 16);* (f) the Comers continued to "use the [Comer Trust and American] property as their own"; (g) "all transactions between the Comer-created trusts, or between the trusts and Mr. and Mrs. Comer [were] legal nullities"; (h) the "grantors, trustees, and beneficiaries of the trusts are . . . Comer family members"; (i) there was "no convincing evidence . . . indicating any independent economic purpose for the existence of any of the trusts"; (j) the trusts' "sole function is to manipulate the Comers' income and assets"; (k) the "expiration of the statute of limitations" argument is irrelevant; (l) "constructive notice of . . . levy" is sufficient; (m) contention that the IRS "is precluded from levying upon such property under the doctrines of res judicata, estoppel, and elections . . . for the years 1982 and 1983" is "ineffective." *(App. B at 17-18)*

In response to Petitioners' Motion to Modify the District Court Record because its holdings were based on new allegations and theories presented for the first time in IRS's Amended Post-Trial Brief, the Court issued an Order denying the Motion and concluding "that defendants raised no new or novel theories after trial that were not within the parties' contemplation throughout pretrial proceedings and throughout trial." *(App. D at 21)*

3. *The Court of Appeals Decision.* Petitioners appealed, and on June 22, 1992 the court of appeals affirmed, holding that: (a) the "decision was supported by the evidence and the other issues on appeal are without merit"; (b) "there was no new issue raised after trial which was not contemplated"; (c) "each of the plaintiffs received constructive notice" of seizures; (d) "under the six-year limitations period . . . the levies were timely served" *(App. A at 3-4);* (e) "the stipulation agreement pertaining to another tax year does not have preclusive effect on this action"; (f) "finding that the taxpayers engaged in fraudulent conveyances is not clearly erroneous"; and (g) a "finding of alter ego

status [is neither] clearly erroneous or contrary to law." *(App. A at 4)* On July 30, 1992, followed by its Mandate of August 10th, the court issued its Order denying Petitioners' Motion for Reconsideration. *(App. E at 23)*

REASONS FOR GRANTING THE WRIT

I. Introduction.- The district court's decision, affirmed by the court of appeals, is contrary to the: Rules of Evidence; State and Federal Statutes; established laws of the State of Michigan; prior holdings of the Sixth Circuit; and, the holdings of other Circuits as well as those of this Court. A careful examination of the trial record reveals that the court's decision was little more than a thinly disguised paraphrase of the findings and conclusions in the IRS's Amended Post-Trial Brief *(R. 46)*, and, was primarily based upon issues and theories raised for the first time after trial to which Petitioners were afforded no rebuttal opportunity. The court's are "condemned [for] the 'mechanical adoption' of a party's proposed findings of fact and conclusions of law." *McDowell v. Safeway Stores, Inc.*, 753 F.2d 716, 717 (8th Cir. 1985); *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1984). Despite the court's acceptance of IRS's "new and novel theories" raised after trial, which were ***not*** "contemplated" by Petitioners, the decision was based upon the barest scintilla of evidence (much of it misrepresented) covering a 15-year time period and far from sufficient to uphold the seizures of Petitioners' properties. Many of the court's conclusions merely reflected its personal opinion and were ***not*** supported by substantial evidence. The court offered ***no*** findings whatsoever as to how "manipulation" of "income and assets" *(App. B at 17)* was more beneficial to the Comers than had corporate or partnership entities been used. In truth, the ***only*** benefit obtained from the trusts was their distributions of income to the Comers' children (claimed as taxable income by them) as provided under *IRC §§ 641, 643.*

II. Consequences of a Judge-made Exception to State Law and U.S. Statutes.- Based upon evidence that the decision is now being used by the IRS as a new avenue of attack on valid irrevocable trusts, the holding raises the distinct probability that such actions will become the norm in cases involving trusts controlled by family members. If left standing, the decision will create a precedent and will materially conflict with established trust, contract and property laws in existence for the past fifty years. Furthermore, it will make a mockery of the Rules of Evi-

dence, Due Process rights to be fully informed of all allegations to be used against a party at trial, and Statutes of Limitation.

III. Violence Done to the Statutory Scheme.- *Treasury Regulations §§ 301.7701-4(a) and (b)* provide for recognition of trusts even though the trustees and beneficiaries are related parties, and even when they are created for business purposes. *I.R.C. §§ 671-677* provide the ***sole*** statutory means whereby a trust may be attributed to its grantor for income taxation purposes, as also provided under Michigan law.[2] To legally confer alter ego status upon Petitioners, specific statutory violations must be alleged and proven, yet none were cited by the courts. *I.R.C. § 6502* limits the IRS's right to levy and seize properties to exactly six years. *I.R.C. § 6322* provides that IRS liens are unenforceable by reason of lapse of time (*i.e.*, expiration of the six year period), yet for the years of 1976-1979 the courts permitted the IRS's levies and seizures to stand although obviously executed long after the six year period had expired. *MCL § 566.12* governs the manner in which a person may be held insolvent. *MCL § 566.17* requires that "actual intent" to defraud present or future creditors must be ***proven*** before a fraudulent conveyance can be found. The courts' claim of finding sufficient evidence to support both holdings is clearly erroneous, particularly in light of the fact that IRS made no such allegations until after trial. *MCL § 449.28* provides that a valid creditor may obtain a "charging order" against a liable partner's interest, but may not seize the assets of the partnership itself. However, the court permitted the IRS to flagrantly violate such statute even though the IRS had completed audits of the limited partnerships and accepted their tax returns as filed.

IV. Reasons for Granting Certiorari.-

(a) The Courts holding that the IRS's levies and seizures were timely served is contrary to fact and law.- The courts found that the Feb. 12, 1987 levies and seizures were

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2 *Michigan Compiled Laws ("MCL") § 141.628.* The "statute makes no other exceptions. Courts may not invent them." *Hawkins v. Comm.*, 152 F.2d 221, 222 (5th Cir. 1945); *Rothstein v. United States*, 735 F.2d 704, 709-710 (2d Cir. 1984); *Madorin v. Comm.*, 84 T.C. 667, 669 (1985). State law determines the interests in trusts, and whether the assets may revest in the grantor. *Blair v. Commissioner*, 300 U.S. 5, 9-10 (1936); *Helvering v. Stuart*, 317 U.S. 154, 161 (1942). Any other method of attributing assets to the grantor "would violate the Fifth Amendment." *Helvering v. Helmholz*, 296 U.S. 93, 98 (1935)

made for "tax years ending 1976 through 1980, and 1985," holding that because the assessments could not "be challenged" the "levies were timely served" under the "six-year limitations period" provided by *26 U.S.C. § 6502 (App. B at 17; App. A at 3-4)*, contrary to fact and law. However, the transfers to the Comer Trust and American were made long before IRS became a creditor. A tax lien cannot attach to property which the taxpayer had previously tranferred and which no longer belongs to him. *St. Louis Union Trust Co. v. United States,* 617 F.2d 1293, 1301 (8th Cir. 1980); *U.S. v. Carlson,* 61-1 USTC (ND IL. 1961); *Chamberlain v. Conley,* 64-2 USTC (D CN. 1964). A copy of the IRS's recorded lien was submitted at trial, without objection, declaring the **official** assessment dates for 1977, 1978 and 1979 as July 1978, July 1979 and July 1980, respectively. Once the assessments are recorded, the liens are perfected. *In re Monarch Industries, Inc.,* 609 F.2d 117 (5th Cir. 1979). *See Hobson,* 163 F.Supp. 117, 118 (ED MI, 1958). 1976's assessment was obviously **prior** to these dates. *See infra,* p. 9. In reading IRC § 6322 with IRC § 6502, the years of 1976-1979 automaticaly lapsed on July 29, 1986, or earlier. The **only** years for which the statue of limitations had not run were 1980 and 1985, mandating removal of the liens and levy and seizure amounts for the 1976-1979 years.[3] Because ***over*** six years had elapsed for the years 1976-1979, the decision contravenes the plain language of *IRC § 6502* and conflicts with all other court of appeals' interpretation of this Statute. *(U.S. v. Updike,* 281 U.S. 489; *United States v. Tyrell,* 218 F.Supp. 733, 737 (SD IL. 1963), aff'd 329 F.2d 341 (7th Cir. 1964)), as statute of limitations "are to be intrepreted liberally in favor of the taxpayers." *Bowers v. N.Y. & Albany Co.,* 273 U.S. 346, 350 (1926). *See, United States v. Motsinger,* 123 F.2d 585, 589 (4th Cir. 1941); *Stonega Coke & Coal Co. v. Commissioner,* 57 F.2d 1030, 1031 (3d Cir. 1932).

The District Court refused to consider the Petitioners' challenge to the timeliness of the levies on the grounds that they were not the "taxpayers" and thus could not challenge the assessments. The conclusion is inconsistent with the Court's

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3 *United States v. Mandel,* 377 F.Supp. 1274, 1277 (SD FL. 1974). *See, United States v. Spreckels,* 50 F.Supp. 789, 791 (ND CA. 1943). Levy and seizure actions "must be begun within six years of the assessment." *United States v. Diamond,* 142 F.Supp. 441, 443 (SD NY. 1956). *See, O'Hare v. U.S.,* 878 F.2d 953, 955 (6th Cir. 1989).

overall conclusion that the Petitioners were "alter egos" of the Comers. The "alter ego" doctrine disregards the separateness of the parties. The court applied the "alter ego" doctrine in finding that Petitioners had received "constructive notice" when the levies were served on Mrs. Comer. This selective recognition of the separate nature of the Petitioners for purposes of standing to raise the statute of limitations effectively "whipsaws" the Petitioners.

(b) The courts' findings were not supported by substantial evidence.- In their appeal, Petitioners documented over **20** erroneous findings *(App. B at 8-17)* that were key to the court's adverse decision *(AB, items 1-23)*, including: (1) W. Comer's alleged conveyance of lifetime services as "illustrative" of alter ego. However, this could not have occurred because the trust instrument clearly was ***not*** a conveyance document *(See infra,* p. 5) and thus he did not "ignore" a **non**-existing agreement. Indication that the finding was based on personal opinion and unsupported allegations was the court's gross misquote from IRS's Amended Post-Trial Brief *(R.46, p. 2, item 4)* rather than from W. Comer's true testimony contained in the Trial Transcript. *(See infra,* p. 5*)* Finding alter ego status because W. Comer "ignored" a non-existing conveyance, and which prior courts had long held invalid and unenforceable *(Charles J. Gerlach Family Estate v. Comm.*, TC Memo 1981-71; *Wesenberg v. Comm.*, 69 T.C. 1005 (1978)), is contrary to law as "illegal agreements . . . may be classed as unenforceable." *Williston, A Treatise on the Law of Contracts,* 3d Ed., Vol. 1 § 16, pps. 29-30; Vol. 14, § 1630, p. 15; § 1630A. (2) Transfer of all W. Comer's assets to the Comer Trust rendered him insolvent and constituted a fraudulent conveyance. Transfer of household contents, etc., is ***not*** proof that ***all*** assets were transferred. W. Comer's unrebutted testimony proved that he had retained several valuable assets in his own name ***after*** creation of the Comer Trust and American, and, was not insolvent nor indebted to the IRS. *See infra,* p. 5. His retention of two new, expensive, motor vehicles was what allowed him to conduct the dried foods and investment businesses. If he had been rendered insolvent, W. Comer would have had neither the vehicles, nor funds, with which he established American in 1977. *See infra,* p. 7. (3) W. Comer's becoming the sole beneficiary of the trusts at the August 1980 amendments. Such findings were contrary to W. Comer's cross-exam testimony and the Probate Court Orders approving the trust amendments on the basis that they merely

replaced the original instruments and did "not defeat the rights of any present OR future interests of any of the beneficiaries". *See infra,* pps. 6-8. Michigan Probate Courts have "exclusive jurisdiction" over trusts. *(MCL § 600.5021; In re Butterfield Estate,* 418 Mich 241, 251 (1983); *Detroit Trust Co. v. Neubauer,* 325 Mich 319, 335 (1949). "Probate court orders are final orders . . . and are *res judicata* of the matters disposed of therein." *Banks v. Billups,* 351 Mich 628, 634 (1958). Orders involving reformation of trusts and trust property interests are binding on the IRS and Federal Courts. *Eisenmenger v. Comm.,* 145 F.2d 103, 106 (8th Cir. 1944); *Preston's Estate v. Comm.,* 187 F.2d 531 (2d Cir. 1951), aff'g 14 T.C. 139; *Darlington's Estate v. C.I.R.,* 302 F.2d 693 (3d Cir. 1962). (4) Inference that W. Comer was the only signer of the June 1, 1980 TRYE Employment Agreement. *(App. B at 10)* However, the Agreement was signed by both trustees, plus W. Comer as the contractor. *See infra,* pps. 5, 8; *D.Ex. 21.* (5) W. Comer improperly signed a vehicle lease agreement as trustee of American. *(App. B at 17)* In fact, he was appointed immediately after executing the trust just as was the case with the Comer Trust and ***was*** a co-trustee when he executed the Vehicle Lease and functioned actively as such until his resignation in 1981. *See infra,* p. 7. (6) In 1977, American leased 1977, 1978 and 1979 vehicles to TRYE. *(App. B at 11)* While the original lease was executed on January 19, 1977, under cross-exam W. Comer explained that the later vehicles were merely added as "written Addenda to the lease" *(D.Ex. 18)* with each addition specifying the "lease" date, the amount of the "monthly" lease fee for each vehicle and the date that vehicle's lease was "released" *(i.e.,* terminated). For the court to use an isolated portion, rather than the document as a whole, contrary to unrebutted cross-exam testimony, is a gross abuse of discretion. The record is clear that this lease agrement was honored by **all** parties throughout its existence. *See infra,* p. 7. (7) W. R. Comer's participation in executing the January 1980 lease agreement between the Comer Trust and TRYE "when he possessed no such capacity." *(App. B at 17)* While he did not execute his ***written*** Acceptance as a co-trustee until July 5, 1980, W. R. Comer had verbally agreed to serve as such and joined with the other parties at the first of the year. Even, arguendo, if his signature was improper, it did **not** invalidate the building lease which was honored by **all** parties until it was terminated. *See infra,* p. 6. (8) W. R. Comer's early resignation as a trustee

of American and subsequent reappointment several years later, and, S. C. Comer's appointment as a co-trustee of American on January 23, 1984. *(App. B at 11-12)* W. R. Comer's resignation was noted in the trust records and the court made ***no*** findings that he improperly functioned as a trustee during that 3-year period. If the courts' intended to infer that S. C. Comer functioned improperly as a co-trustee of American prior to January 23, 1984, the record is clear that he was appointed as a trustee on December 1, 1982 - ***14 months prior*** to the date stated by the court. *See infra,* p. 7. (9) Osa and Burica's failure to introduce evidence depicting their ownership of property. *(App. B at 14)* In actuality, Petitioners ***did*** submit Affidavits, copies of Limited Partnership Agreements and income tax returns to the court, and, in the Joint Pretrial Order the IRS had conceded that all properties levied upon were "titled or held in the names of the . . . plaintiffs." *See infra,* p. 9. (10) Conveyances to the Comer Trust were made with "actual intent" to defraud creditors. *(App. B at 15)* How this finding was derived is beyond Petitioners' comprehension. The Comer's income was such that they paid little or no taxes for the three years preceding the establishment of the Trust in January, 1975. *(R.3: Ex's. EE, FF, GG)* The IRS did not become a creditor for the 1976 year, the first year at issue *(D.Ex.'s. 56, 57),* until April 15, 1977 - ***28 months after*** the Comer Trust was established. *(P.Ex. 1)* Furthermore, the specific non-income tax purposes for the establishment of each entity was presented in detail to the court. *See infra,* pps. 5-9. It is impossible to "intend" to defraud the government of taxes which were neither owed nor contemplated in 1975-1976. (11) The Comer Trust's sale of its "original realty" to Benchley and Koehn in 1981 and 1982 was "indicia of improper property transfers". *(App. B at 10, 16; See infra,* p. 6*)* The basis of this finding also escapes the Petitioners. The sales were at full value to unrelated third parties years after the Trust purchased the 9260 property and long ***before*** the IRS filed a lien in 1984 *(P.Ex. 1)* and levied upon Petitioners in 1987. (12) Comers' continued use of the trusts' properties as their own. *(App. B. at 16)* The district court was fully aware *(See infra,* pps. 5-8, 10*)* that rent had ***always*** been paid for the use of both Comer Trust properties, and for the use of American's vehicles, and, that the Comers never received anything free-of-charge from either Trust. Courts previously held that the ***failure*** to "make the trust properties productive", by using such properties "rent free", was

grounds for disallowance of such trusts. *Markosian v. Comm.*, 73 T.C. 1235, 1243 (1980); *Vnuk v. Comm.*, TC Memo 1979-164, aff'd 621 F.2d 1318 (8th Cir. 1980); *F. Lyle Fogle,* TC Memo 1986-74. However, with ***no*** supportive evidence, the court arbitrarily held that because they involved related parties the leases were not at arms-length and would be disregarded. *(App. B at 16)* The court's rental position is inconsistent with **all** prior relevant court decisions, places Petitioners in a no-win situation, and is contrary to law. (13) Failure to prove an independent economic purpose for such trusts. *(App. B at 17)* While the law does ***not*** require that any independent economic purpose be proven for trusts, their unrebutted purposes were well documented before the court. *(See infra,* pps. 5-8)

When the entire record reveals that the vast majority of the courts' findings of fact forming the basis of its decision are clearly erroneous and based on personal opinion, then the decision must be reversed as clearly erroneous and an abuse of discretion. *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1947) Contrary to the instant action, the Federal Rules of Evidence mandate that such "rules shall be construed to secure fairness in administration [so] . . . that the truth may be ascertained and proceedings justly determined." *Rule 102. Rules 302 and 501* provide that, where applicable, "the rule of decision is determined in accordance with State law." The Trial Transcript reveals that W. Comer's testimony was forthright, uncontradicted, and his reputation never brought into question. Petitioners testified that they had always attempted to maintain the proper "fiduciary responsibility" and relationships and to not do "anything that would violate the law." *(TR 13-14, 60, 92, 152-153)* In accord with the provisions of *Rule 608,* such testimony can not be arbitrarily ignored and discarded.[4]

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4 In truth, 36 of the court's 43 Findings of Fact, No's. 1-2, 4-9, 11-14, 16-21, 23-24, 26, 28, 30-43 *(App. B at 8-13),* fully ***supported*** Petitioners, finding that: (a) assets were transferred to each trust; (b) transfers to the Comer Trust were recorded; (c) trusts were publicly recorded; (d) trust amendments were made under Probate Court Order; (e) building and auto lease agreements were executed between parties; (f) employment agreements were executed between parties; (g) the trusts purchased and sold assets in their respective names; (h) the Comer children and Mt. Zion, a tax-exempt foundation, were beneficiaries of the Comer Trust; (i) each entity maintained separate bank accounts, obtained its own employer I.D. number and filed separate tax returns. In addition, the court did *not*

The holding that Osa and Burica had introduced no evidence, and their dismissal "due to lack of standing", is contrary to fact and law. *See infra*, p. 9. IRS submitted ***no*** evidence that seizure of Osa and Burica's bank accounts were proper and it may not assert liens against valid partnership assets since they belong to the entity. *In re National Specialty Co.*, 213 F.2d 509 (6th Cir. 1954); *MCL §§ 449.28, 449.1703). See, Smith v. C.I.R.*, 937 F.2d 1089 (6th Cir. 1991).

The court's decision contravenes established law and conflicts with its prior decisions, the laws of Michigan, and the decisions of other courts of appeal and this Court. The Rules of Evidence do not afford the trial court discretion to ignore, or find contrary to, unrebutted evidence, and, "does not permit the court to disregard the substantive principles of law established for the protection of such litigants." *Cohen v. Young*, 127 F.2d 721, 726 (6th Cir. 1942). Courts ***must*** presume that: (a) all things have been done regularly; (b) all transactions were conducted honestly and in good faith; (c) business records are evidence of facts in favor of Petitioners; (d) contracts are in accord with principles of law; (e) every man is solvent; and (f) possession of property creates a presumption of ownership.[5]

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find that Petitioners: (a) failed to honor employment agreements; (b) co-mingled funds; (c) paid the Comer's personal expenses; (d) failed to maintain their separate identities; (e) failed to distribute trust proceeds to the proper beneficiaries of the respective trusts, or (f) failed to honor the building and auto lease agreements, nor did the court find that the leased buildings and automobiles were not necessary to or used in the trusts' fulltime business operations. Similar concessions were made by the IRS in their Brief to the court of appeals. *(ABr. at 2-10)*.

5 *Hopson v. Payne*, 7 Mich 334, 340 (1859); *Palmer v. Mason*, 42 Mich 146, 150 (1879); *Am. Jur. PROOF OF FACTS, "Presumptions" § I:270*, pps. 708-710; *Jones on Evidence*, 1972, 6th Ed., Vol. 1, § 3.10, p. 148; *Johnson v. Barton*, 251 F.Supp. 474, 475-476 (WD VA, 1966). Courts are not to presume that a grantor-trustee will violate his trust *(Rand v. Helvering*, 116 F.2d 929, 932 (8th Cir. 1941); *Glenn E. Edgar*, 56 T.C. 717, 752 (1971)), or that related party "trustee[s] will act in accordance with the settlor's wishes." *Gordon v. Comm.*, 85 T.C. 309, 326 (1985). Courts may "not either distort (evidence) or add to it" *(Benes v. United States*, 276 F.2d 99, 103 (6th Cir. 1960)), and "deductions and theories not warranted by the evidence should be studiously avoided." *Blunt v. United States*, 244 F.2d 355, 365 (DC Cir. 1957); *Wood Corporation v. Delaware*, 22 BTA 1182, 1186, aff'd 63 F.2d 1023 (6th Cir. 1933) Courts "may not view the facts and law in the light most favorable to the service" *(Flynn v. United States by and Through Eggers*, 786 F.2d 586, 589 (3d Cir. 1986)), nor "completely ignore the fact that

IRS's evidence "consist[ed] of vague, uncertain, irrelevant matter, not carrying the quality of proof," contrary to the requirments of *McDonald v. Robertson et al.*, 104 F.2d 945 (6th Cir. 1939). In enumerable documents spanning 15 years, the true facts supporting the courts' holding are miniscule. "[S]ubstantial evidence is more than a mere scintilla . . . [I]t must do more than create a suspicion of the existence of the fact to be established." *Universal Camera Corp. v. Labor Bd.*, 340 U.S. 474, 477, 497 (1950). *See, Wigmore, Evidence in Trials at Common Law*, 1981 Ed., Vol. 9, §§ 2495, 2498. Findings of fact upon which a judgment is based may be disturbed on appeal when clearly erroneous, even when there is some evidence to support such findings. *Kennedy v. C.I.R.*, 671 F.2d 167, 174 (6th Cir. 1982) Reliance on *Thompson v. Comm.*, 631 F.2d 642 (9th Cir. 1980) (involving sham, not alter ego), and *Century Hotels v. United States*, 952 F.2d 107 (1st Cir. 1992) is contrary to this circuit's holdings in *Cohen, Kennedy, DeNiro* and *McDonald.* Furthermore, "'alter ego' and 'sham' are not synonymous, as the case law illustrates." *United States v. Creel*, 711 F.2d 575, 579 (5th Cir. 1983), cer. den. 464 U.S. 1044.

(c) The Courts' holding that Petitioners should have contemplated the IRS's new issues and allegations made after trial was prejudicial, constituted an abuse of discretion and violated their Fifth Amendment rights to Due Process.- Contrary to fact and law, the court found meritless Plaintiffs' argument that the IRS raised new issues after trial, holding that they should have been contemplated under the alter ego issue. *(App. A at 3)* Plaintiff's ***were*** prejudiced because IRS raised new issues of insolvency, fraudulent conveyances, lack of standing for Osa and Burica, sham, lack of economic substance, and lack of arms-length transactions, after trial without prior notice, and,

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the records" supported Plaintiffs. *Clark v. C.I.R.*, 266 F.2d 698, 715 (9th Cir. 1959); *Hughes v. Comm.*, 153 F.2d 712, 713 (5th Cir. 1946) The "whole of the testimony must be considered," not just that which favors the IRS. *Hendrickson v. Voss*, 115 Mich 57, 59 (1897; *Darling v. Hurst*, 39 Mich 765, 768 (1878) The IRS is "bound by (W. Comer's cross-exam) testimony." *Tel-Craft Civic Ass'n v. Detroit*, 337 Mich 326, 30 (1953); *Schaupeter v. Schaupeter*, 317 Mich 84, 90 (1947) When Plaintiffs' "testimony is unimpeached, competent and relevant it 'may not be arbitrarily discredited and disregarded'" as was done herein. *Estate of DeNiro v. C.I.R.*, 795 F.2d 582, 584 (6th Cir. 1986); *Chesapeake & Ohio Ry. v. Martin*, 283 U.S. 209, 219 (1930).

after it consistently maintained there were ***no*** other issues, refused to "identify the case rulings and regulations relied upon to establish Plaintiffs" as such and maintained that it was not challenging such entities under state law. *See infra*, p. 9. The purpose of the rules of discovery under *Rule 26(b), Federal Rules of Civil Procedure*, is to allow a party to discover the facts, legal theories and the statutes and regulations relied upon by an opposing party. *Alliance to End Repression v. Rochford*, 75 FRD 441 (ND IL. 1977); *Frazier v. Phinney*, 5 AFTR.2d 424, 60-1 USTC (SD TX. 1959); *Oppen-heimer Fund Inc. v. Sanders*, 437 U.S. 340 (1978); *Estate of Allen-sworth v. Comm.*, 66 T.C. 33 (1976). Plaintiffs are "not required to offer evidence in anticipation of" the IRS's new and novel theories and allegations (*A. A. Allen Revivals, Inc.*, TC Memo 1963-281), nor "to read between the lines of the pleadings, trial statements, or evidence to ascertain that any theory based on [new issues and theories] was intended by the Commissioner . . . J. William Frentz, 44 T.C. 485, 490-491, aff'd 375 F.2d 662 (6th Cir. 1967)." *Commissioner of Int. Rev. v. Transport Mfg. & Equip. Co.*, 478 F.2d 731, 735, 736 (8th Cir. 1973). Contrary to the courts' finding, insolvency and fraudulent conveyances ***were*** new issues and are regarded as a ***separate*** "framework for analyzing the issue of property ownership." *Loving Savior Church v. United States*, 556 F.Supp. 688, 690-691 (D SD 1983), aff'd 728 F.2d 1085 (8th Cir. 1984). *Cf. United States v. Certain Parcel of Land*, 466 F.2d 1295 (6th Cir. 1972). The purpose of Pretrial Orders is to limit the trial to the stated "contested issues" . . . [and] issues specified at pretrial conference . . . constitute the issues on which the case is to be tried. An issue omitted from the pretrial order may be considered waived." *62A Am.Jur.2d 50 and 73*, "Pretrial Orders", pps. 563, 579-580. IRS's "failure to disclose the [legal and factual] theories" requires reversal of the courts' holdings. *Weiss v. Chrysler Motors Corporation*, 515 F.2d 449, 454-457 (2d Cir. 1975), cited in *Hockley v. Zent, Inc.*, 89 F.R.D. 26, 30 (MD PA. 1980).

The finding is contrary to that of *Carter v. Kubler*, 320 U.S. 243, 247 (1943), aff'g 131 F.2d 222 (6th Cir.), that Plaintiffs are entitled to a "full and fair hearing," including the right to rebut allegations. One "of the most fundamental requirements of due process is that an individual must receive adequate notice

of the charges or claims being asserted against him"[6], and its "patently unfair to decide this case on (theories) of which [Plaintiffs] were unaware and thus did not have an opportunity to meet at the evidentiary stage." *Baird v. C.I.R.*, 438 F.2d 490, 493-494 (3d Cir.).

(d) The Courts' holding that Petitioners were insolvent and engaged in fraudulent conveyances, and, that such issues were important factors in determining alter ego status, are contrary to fact and law.- The holding that the issue of fraudulent conveyances is part of the basis of proving alter ego relationships is contrary to law. *Loving Savior*, supra at 690-691 (transfers made **after** liabilities incurred); *Certain Parcels*, supra. The court's reliance on *Thompson*, supra (where the individual grossly inflated property values to generate income tax deductions), *(App. A at 4)* is misplaced, and, findings of insolvency and fraudulent conveyances are contrary to all evidence. *See infra*, pps. 4-7. In *Farrell v. Paulus*, 309 Mich 441 (1944), demands and litigation commenced for unpaid liabilities ***before*** the grantor transferred his assets and thereby became insolvent. A "fraudulent intent will not be presumed where an honest intent can as readily be inferred from the evidence."[7]

Based upon the Comer's very modest income for the years 1972-1974 *(see infra*, p. 6), it was impossible for them to

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6 *United States v. Baker*, 807 F.2d 1315 (6th Cir. 1986). Also, *United States v. Cabbage*, 430 F.2d 1037 (6th Cir. 1970); *Gonzales v. United States*, 348 U.S. 407, 413, 414 (1954). Civil trials must involve a "fair contest with the basic issues and facts disclosed to the fullest practicable extent" *(United States v. Proctor & Gamble*, 356 U.S. 676 (1957)), trial courts should "not consider issues" not plead *(J. William Frentz*, supra; *W. F. Strasburger*, TC Memo 1962-255, aff'd 327 F.2d 236 (6th Cir. 1964)), and may not consider IRS's new theories raised for the first time in its brief. *Rhodes-Jennings Furniture Co. v. Comm.*, 9 TCM 1019, aff'd per cur. 192 F.2d 1022 (6th Cir. 1951); *Church of Scientology of California v. Commr.*, 83 T.C. 381, 524-525, aff'd 823 F.2d 1301 (9th Cir. 1987).

7 *37 Am.Jur.2d 699*, "Fraudulent Conveyances", § 8; *Geer v. Traders' Bank of Canada*, 132 Mich 215, 218 (1903); *Rossman v. Hutchinson*, 289 Mich 577, 594 (1939); *Nicholson v. Scott*, 50 F.Supp. 209, 212 (ED MI. 1943); *Reilly v. Pinkus*, 338 U.S. 269, 276 (1949). Suspicion of fraud is "not sufficient". *Pogodzinski v. Kruger*, 44 Mich 79, 80 (1880); *Miller v. Beadle*, 65 Mich 643 (1887); *Drieborg v. Comm.*, 225 F.2d 216, 220 (6th Cir. 1955). The "burden" to disprove fraud is "never imposed upon" the Petitioners *(Mason v. Mason*, 296 Mich 622, 296 N.W. 703, 705 (1941)), and "every reasonable intendment will be indulged against a construction implying fraudulent design". *Palmer v. Mason*, supra at 150.

have foreseen subsequent tax liabilities. *See infra,* pps. 4-7. Under *MCL § 600.5813,* IRS's levies and seizures were limited to six years after the transfers in 1975-1977 and were null and void, particularly when its assessments for the years 1976-1979 were issued prior to 1981. *Berry v. Chrysler,* 150 F.2d 1002 (6th Cir. 1945); *Sweet v. Shreve,* 262 Mich 432 (1933); *Thatcher v. Detroit Trust Co.,* 288 Mich 410, 415 (1939). IRS did not become a creditor for the 1976 year until April 15, 1977, 28 months ***after*** the Comer Trust was established. *See infra,* p. 16.[8] "For the court to hold that a fraudulent conveyance was made . . . [it] must find insolvency based upon the value of the assets and the liabilities as they existed prior to or as a result of the challenged transfer." *In re Otis & Edwards, P.C.,* 115 B.R. 900, 911 (ED MI. 1990). Insolvency "cannot be assumed". *John Ownbey Co., Inc. v. C.I.R.,* 645 F.2d 540, 546 (6th Cir. 1981); *United States v. Schroeder,* 242 F.Supp. 430, 434 (SD IA. 1964), aff'd 348 F.2d 223, 225 (8th Cir. 1965). Because the 1975-1977 transfers did ***not*** render the Comers insolvent, and IRS was not a creditor, they "must stand, whether with or without consideration". *Watzel v. Beardslee,* 289 Mich 522, 526 (1939). *See, Kester v. Adams,* 85 F.2d 646, 649 (9th Cir. 1936), cer. den. 299 U.S. 608; *Schreyer v. Scott,* 134 U.S. 405, 409-412, 33 L.Ed 955, 957-958 (1889) IRS ***failed*** to present the required evidence that taxpayers' were insolvent at the time of the conveyances to the Comer Trust or American.[9] If assets exceed liabilities, conveyances will not be set aside. *Michigan Trust Co. v. Adams,* 109 Mich 181, 182 (1896); *United States v.*

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8 *United States v. Adams Bldg. Co., Inc.,* 531 F.2d 343 (6th Cir. 1976); *United States v. Ressler,* 433 F.Supp. 459, 463 (SD FL. 1977), aff'd 576 F.2d 650 (5th Cir. 1978). Under *MCL § 566.12,* IRS "must establish that the conveyance was fraudulent under state law." *U.S. v. Rode,* 749 F.Supp. 1483, 1493 (WD MI. 1990); *Otte v. Landy,* 143 F.Supp. 893, 897 (ED MI. 1956), aff'd 256 F.2d 112 (6th Cir. 1958); *Hayduk v. Lanna,* 775 F.2d 441, 443 (1st Cir. 1985). Tax liens can not attach to property transferred to trusts prior to the time the IRS became a creditor. *U.S. v. General Motors Corp.,* 929 F.2d 249, 252-253 (6th Cir. 1991); *Beaty v. U.S.,* 937 F.2d 288 (6th Cir. 1991). IRS must also establish that the Comers were insolvent under state law. *Robert Leslie Bowlin,* 31 T.C. 188, 208, aff'd 273 F.2d 610 (6th Cir. 1960); *Ownbey,* supra at 546; *Schroeder,* 348 F.2d at 225.

9 *Mack v. Bank of Lansing,* 396 F.Supp. 935 (WD MI, 1975); *Tyson v. Comm.,* 212 F.2d 16 (6th Cir. 1954); *Ownbey,* supra at 546; *Watzel v. Beardslee,* supra; *Linke v. Goodrich,* 30 Mich.App. 228 (1971).

Press Wireless, 187 F.2d 294, 295 (2d Cir. 1951); *United States v. Oklahoma*, 261 U.S. 252, 260-261 (1922). Any insolvency years later is irrelevant to the date of the transfers. *Mack*, supra at 942; *Chamberlin v. Wagar*, 272 Mich. 595 (1935). The decision contravenes state law, and, directly conflicts with prior decisions of this circuit and those of other courts of appeals.

The issue of fraudulent conveyances "must not only be proved but must be particularly alleged." *Geisert v. Corriveau*, 140 F.Supp. 29, 32 (ED MI, (1956). *See, Bender v. Southland Corp.*, 749 F.2d 1205, 1216 (6th Cir. 1984); *Duane v. Altenburg*, 297 F.2d 515 (7th Cir. 1962). No such allegation was made until ***after*** trial, and petitioners "were totally unaware that the case would be decided" on the basis of fraudulent conveyances. [10] There "must be proof of an actual intent to defraud" a subsequent creditor *(Lovell v. Denison*, 171 Mich 599 (1912)), and conveyances made long before the debt was incurred is insufficient. *See infra*, pps. 5-8, 11.[11] Whether "intent to defraud creditors [occurred] depends under the circumstances . . . upon the date of such transfer." *Wright v. Brown*, supra at 571. *See, Sch-*

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10 *In re Prestige Spring Corp.*, 628 F.2d 840, 842 (4th Cir. 1980). Rule 9(b), Federal Rules of Civil Procedure, "bars a [party] from 'alleging fraud by hindsight'." *Bender v. Rocky Mountain Drilling Associates*, 648 F.Supp. 330, 336 (DC DC. 1986). *See, Hayduk v. Lanna*, supra at 443; *Spiegler v. Wills*, 60 F.R.D. 681, 682 (SD NY. 1973). Allegations which are "merely conclusionary" are "not enough" to satisfy Rule 9(b). *Graue Mill Dev. v. Colonial Bank & Trust Co.*, 927 F.2d 988, 992 (7th Cir. 1991); *Felton v. Walston and Co., Inc.*, 508 F.2d 577, 581 (2d Cir. 1974). *See, Lackawanna Pants Mfg. Co. v. Wiseman*, 133 F.2d 482, 486 (6th Cir. 1943); *Zimmerman v. Feldman*, 217 Mich 390, 399 (1922); *Dean v. Torrence*, 299 Mich 24, 35 (1941). *See, Fricke v. Abbott*, 368 Mich 551 556 (1962). Contrary to the facts herein, the IRS must make its "allegation good by independent evidence". *Hutchinson v. Poyer*, 78 Mich 337, 340 (1889). A "delineation of the underlying acts and transactions which are asserted to constitute the fraud" are required. *duPont v. Wyly*, 61 F.R.D. 615, 630 (D DE. 1973); *Powell, Inc. v. Abney*, 83 F.R.D. 482, 487 (SD TX. 1979); *Fulk v. Bagley*, 88 F.R.D. 153, 164 (MD NC. 1980). "The burden of proof to show fraud and notice of fraud was on the party alleging fraud". *Bamberger, Bloom & Co. v. Schoolfield*, 160 U.S. 149, 162, 40 L.Ed 374 (1895); *Wright v. Brown*, 317 Mich 561, 571, 574 (1947); *Federal Deposit Ins. Corp.*, 654 F.Supp. 794, 808 (ND GA. 1986) Failure to allege fraud, and the facts relied upon, mandate reversal. *Wait v. Kellogg*, 63 Mich 138, 144-145 (1886); *Leoni v. Rogers*, 719 F.Supp. 555, 569 (ED MI. 1989).

11 *MCL §§ 566.11, 566.17; Ownbey*, supra; *Lackawanna*, supra; *Nicholson v. Scott*, supra at 212; *In Re Bidlofsky*, 57 B.R. 883, 898 (BR ED MI, 1985); *Dean v. Torrence*, supra at 31-37; *Rossman v. Hutchinson*, supra at 594.

roeder, 242 F.Supp. at 435; *Otte v. Landy*, supra at 898. Subsequent grantor involvement is insufficient to set aside conveyances as fraudulent. *Jaffe v. Ackerman*, 279 Mich. 304 (1937) Under Michigan law, only existing creditors have a right to challenge conveyances as fraudulent.[12]

(e) The Courts' holding that Petitioners were alter egos of the taxpayers is not supported by substantial evidence and was contrary to fact and law.- Plaintiffs were **not** alter egos. *(App. A at 2-4)* Reliance on *G. M. Leasing Corp. v. United States*, 429 U.S. 338 (1976), and *F.P.P. Enterprises v. United States*, 646 F.Supp. 713, aff'd 830 F.2d 114 (8th Cir. 1987) is misplaced. In *G.M. Leasing*, the taxpayer failed to file tax returns, was a fugitive from justice, the vintage vehicles seized were **not** leased, although that was their claimed purpose, and were titled to a corporation owned by the taxpayer. In *F.P-.P. Enterprises*, third parties were falsely listed as grantors, the true grantors continued using the property free of charge and to receive its income, personally paid insurance, taxes and mortgage payments, deducting such taxes, interest, and depreciation on their personal tax returns. The trusts were found invalid under state law. ***None*** of these facts, or anything similar, were found to be present herein. To disregard a trust, "the burden rests on the party seeking to pierce the veil" and the "burden is a significant one."[13]

The Courts' findings are contrary to its holding in *Hamiel's Estate v. Commissioner*, 253 F.2d 787, 790-91 (6th Cir.

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12 *Sorenson v. Sorenson*, 69 Mich. 351; *Hatch v. Daugherty*, 145 Mich. 569; *Gillen v. Wakefield State Bank*, 246 Mich 158, 163 (1929) "No inference of fraud . . . is permissible from lack of monetary consideration alone." *Mallery v. Van Hoeven*, 332 Mich 561, 563 (1952); *Coleman v. Coleman*, 239 Mich 139, 141 (1927). *See, Scott, The Law of Trusts ("Scott")*, Vol. 1, §§ 17.1, 28, 29; *Bogert, The Law of Trusts and Trustees ("Bogert")*, § 202; *Restatement of Trusts, Second ("Restatement")* §§ 28, 29. A grantor can make a gift to family members, as long as the gift does not render him insolvent, and fraud is not to be presumed. *Kalamazoo Spring & Axle Co. v. Winans & Co.*, 102 Mich 193, 198 (1895); *Dean v. Torrence*, supra at 35-36; *Schroeder*, 242 F.Supp. at 436.

13 *Edwards Co., Inc. v. Monogram Industries, Inc.*, 700 F.2d 994, 999 (5th Cir. 1983). *See, John A. Parks Co. v. Discount Corp.*, 294 Mich 316, 331-332 (1940); *Zubik v. Zubik*, 384 F.2d 267, 270 (3rd Cir. 1967), cer. den. 390 U.S. 988; *Matter of Palmer Trading Post*, 695 F.2d 1012, 1016-1019 (7th Cir. 1983); *American Protein Corp. v. AB Volvo*, 844 F.2d 56, 60 (2nd Cir. 1988).

1958). Mere relationships between the parties does ***not*** constitute alter ego, an entity is ***not*** to be lightly disregarded, and, each case ***must*** be decided on its own facts, not those of some unrelated case.[14] "A trust can only operate through its Trustees just as a corporation can act only through its agents". *Johnson v. Comm.*, 78 T.C. 882, 890-891, aff'd 734 F.2d 30 (9th Cir. 1984). *See, Bogert*, § 121; *Scott*, Vol. I, §§ 2.3, 2.6. Despite interlocking relationships, efforts to maintain separate identities ***must*** be respected.[15] A transaction "must not be disregarded simply because it was not at arm's length . . . And we think it would be judicial legislation of the most inexcusable kind for a court to create such a rule."[16]

State law is conclusive as to the ownership of property *(U.S. v. General Motors Corp.*, 929 F.2d 249 (6th Cir. 1991); *Commissioner v. Stern*, 357 U.S. 39 (1957), aff'g 242 F.2d 322 (6th Cir. 1957)), and IRS's rights to property are "never better than those which the taxpayer had." *Hobson*, supra; *United States v. Rodgers*, 461 U.S. 677, 715 (1983); *Wentworth v. C.I.R.*, 510 F.2d 883, 885 (6th Cir. 1975). The trial court ***failed*** to find any typical instances of alter ego situations *(See infra*, pps. 17-18), and "technical infractions of duties as trustee by a settlor-trustee, or actions taken by him under a misconception of

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14 *Lettinga v. Agristor Credit Corp.*, 686 F.2d 442, 446 (6th Cir. 1982); *United States v. Certain Parcel of Land*, supra; *Madden v. Mac Sim Bar Paper Co.*, 163 F.2d 974 (6th Cir. 1939), cer den. 308 U.S. 556; *Drysdale v. C.I.R.*, 277 F.2d 413, 417-418 (6th Cir. 1960); *Simon J. Murphy Co. v. Comm.*, 231 F.2d 639, 644 (6th Cir. 1956); *Van Zandt v. Comm.*, 341 F.2d 440, 444 (5th Cir. 1965).

15 *Choate v. Landis Tool Co.*, 486 F.Supp. 774 (1980); *Coryell v. Phipps*, 317 U.S. 406 (1942); *Gottlieb v. Arrow Door Co.*, 364 Mich. 450 (1961); *John A. Parks Co. v. Disc. Corp.*, 294 Mich. 316 (1940); *Soloman v. Wstrn Hills*, 110 Mich.App. 257 (1981).

16 *Sun Properties v. United States*, 220 F.2d 171, 174 (5th Cir. 1955). *See, 58th St. Plaza Theatre, Inc. v. Comm.*, 16 T.C. 469, aff'd in part 195 F.2d 724 (2d Cir. 1952); *White Tool & Machine Co. v. Comm.*, 677 F.2d 528 (6th Cir. 1982); *Levenson & Klein, Inc.*, 67 T.C. 694, 718 (1977). Even if entities are "organized primarily for tax ...purposes [it] does not warrant disregarding" them under state law. *Smith v. Northern Mich. Hospitals, Inc.*, 703 F.2d 942, 951 n. 19 (6th Cir. 1983); *Kline v. Kline*, 104 Mich.App. 700 (1981); *Weeks v. Sibley*, 269 F. 155 (D. TX. 1920). "The general rule of Subchapter J is that trust income is taxed only once, either to the trust or to the beneficiaries". *Charles Stewart Baker*, TC Memo 1990-107; *Provident Nat. Bank v. United States*, 325 F.Supp. 1187, 1191 (ED PA. 1971).

law, can not, of themselves, warrant a disregard for tax purposes of the trusts." *Curtis A. Herberts v. Comm.*, 10 T.C. 1053, 1068 (1948); *Bennett v. Comm.*, 79 T.C. 470 (1982).

The record is clear the trial court's erroneous holding of alter ego was based ***solely*** on the fact that (a) Comer family members were involved with such rusts, and (b) the Comer's incurred a tax liability after the Comer Trust and American were created. If alter ego was the only issue, and there was no challenge to the Petitioners' validity under state law, then any finding of insolvency and fraudulent conveyances is erroneous. *See infra*, pps. 21-24. The cases cited by the court involved 20 factual situations ***far*** removed from the facts in this case. *(App. B at 14-16)* Contrary to the courts' presumptions, the law requires that irrevocable trusts ***must*** be "most strongly construed against" the grantor. *Rothschild v. Dickinson,* 169 Mich 200, 206 (1912); *In re Maloney Trust,* 423 Mich 632, 639 (1985). Taxpayers intent in creating trusts for his children must govern. *Union Guardian Trust Co. v. Building Securities Corp.*, 280 Mich 144; *Commissioner v. Culbertson,* 337 U.S. 733, 743 (1949). Individuals have a legal right to create trusts for any lawful purpose, including business, probate *(Bogert,* § 231; *Scott,* Vol. 1A, § 59; *Restatement,* § 59*)* and estate planning for the benefit of the grantor's family *(Bogert,* §§ 202, 231; *76 Am.Jur.2d. § 19,* p. 267; *Commerce Trust Co. v. Woodbury,* 77 F.2d 478 (8th Cir. 1935), cer. den. 296 U.S. 614; *Coryell v. Phipps,* 128 F.2d 702 (5th Cir. 1942), aff'd 317 U.S. 406 (1942); *Sparks Farm, Inc.*, TC Memo 1988-492), and, the grantor may serve as trustee, even when leasing transferred properties.[17]

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17 *May v. Comm.*, 723 F.2d 1434 (9th Cir. 1984); *Brooke v. United States,* 468 F.2d 1155 (9th Cir. 1972); *Evans v. U.S.*, 83-2 USTC; *Stanley J. Wolfe,* TC Memo 1984-446; *Bogert,* §§ 121, 231; *Scott,* Vol. 1, § 17.1, Vol. II, §§ 99.1, 100; *Restatement,* §§ 28, 99, 100, 115, 119. As Trustee, "dominion and control" of such trusts *is* permissible. *IRC §§ 671(a), 673-677; Hamiel's Estate v. Comm.*, 253 F.2d 787, 790-791 (6th Cir. 1958); *Suhr v. Comm.*, 126 F.2d 283, 287-288 (6th Cir. 1942); *Reinecke v. Trust Co.*, 278 US 339, 346 (1929); *U.S. v. Byrum,* 408 US 125 (1972) (trusteeship does not constitute substantial ownership); *Rose v. Union Guardian Trust Co.*, 300 Mich. 73, 76-78 (1942); *Fornell v. Fornell Equip.*, 390 Mich. 540, 548-52 (1973). Business trusts are valid in Michigan. *Hemphill v. Orloff,* 238 Mich. 508, 512-525 (1927); *U.S. v. Davidson,* 115 F.2d 799 (6th Cir. 1940); *3 Cavitch, Business Organizations,* §§ 43.01[2], 43.05. No consideration is required to establish a trust. *Ash v. Ash,* 280 Mich. 198 (1937); *Mallery v. Van Hoeven,* 332 Mich. 561 (1952); *Scott,* Vol. 1, §§ 17.1, 28, 29; *Bogert,* § 202; *Restatement,* §§ 28, 29.

A "deed or other written instrument is to be construed so as to render it valid and effectual, rather than void." *Stamp v. Steele,* 209 Mich 205, 210 (1920). *See, Roland P. Place,* 17 T.C. 199, 203, aff'd 199 F.2d 373 (6th Cir, 1952). Leases between related parties, as herein, are binding. *Campbell v. C.I.R.,* 868 F.2d 833 (6th Cir. 1989); *Mackinac Island Carriage Tours, Inc. v. C.I.R.,* 419 F.2d 1155, on rem. 455 F.2d 98 (6th Cir. 1972); *Michigan Trust Co. v. Herpolsheimer,* 256 Mich 589 (1932). The language of contracts (as here), must be adherred to. *Golden v. Henderson,* 456 F.2d 378 (6th Cir. 1972); *T.V.A. v. Exxon Nuclear Co.,* 753 F.2d 493 (6th Cir. 1985). The leases were "entered into in good faith between the parties . . . [were] perfectly reasonable and valid . . . [and] there was nothing fraudulent" in any circumstances. *First Nat. Bank v. Young's Estate,* 41 F.2d 8, 10 (6th Cir. 1930). *See, Am.Jur. Proof of Facts, 13 POF* "Delivery of Deeds", § 3, p. 485, § 21, p. 494; Williston, *A Treatise on the Law of Contracts,* 3d Ed., Vol. 4, § 620, pps. 747-750. The subject leases gave "exclusive possession of the premises against all the world, including the" Comer Trust, American and the Comers. *Smith v. Royal Ins. Co.,* 111 F.2d 667, 670 (9th Cir. 1940). *See, Matter of Daben Corp.,* 469 F.Supp. 135, 142-143 (1979); *Estate of Joseph Giselman,* TC Memo 1988-391. Even when the transferor becomes a tenant and subsequently is unable to continue the lease payments, the transfer will not be disregarded. *Estate of Roy D. Barlow,* 55 T.C. 666 (1971); *Estate of Joseph W. Giselman,* supra.

Petitioners cannot be held guilty for complying with the law and exercising the powers and rights which the Constitution and State say they may exercise. *Gledhill v. Fisher & Co.,* 272 Mich. 353, 364 (1935) The rules of evidence mandate that "the presumption is in favor of good faith, honesty and fair dealing." *McDonald v. Robertson,* supra at 947. Such was not present in this case, and a finding of alter ego contravenes the abundance of law of this State, and, this and other courts of appeal.

(f) The Courts' holding that the IRS was not bound by the doctrines of res judicata, elections and estoppel is contrary to fact and law.- The holding that, because there was no judgment on the merits, the stipulation agreements involving other tax years do not have preclusive effect *(App. A at 4)* is contrary to the trial court's holding. *(App. B at 17-18).* Plaintiffs argued that the prior Stipulated Decisions were for the years

1976-1983, not just 1981. *See infra*, p. 9. Reliance on *In re Long Distance Telecomm. Lit.*, 831 F.2d 627 (6th Cir. 1987) is misplaced and contrary to the law of the Tax Court and this circuit.[18] Stipulations "must be resolved against the Commissioner as the party who prepared" them. *Clapp v. C.I.R.*, 875 F.2d 1396, 1399 (9th Cir. 1989). *See, Stamos v. Commissioner*, 87 T.C. 1451, 1455 (1986). The "doctrine of equitable estoppel . . . may be invoked against the United States". *Simmons v. United States*, 308 F.2d 938, 945 (5th Cir. 1962). *See, Walsonavich v. United States*, 335 F.2d 96, 101 (3rd Cir. 1964); *United States v. Lucienne D'Hotelle*, 558 F.2d 37, 43 (1st Cir. 1977). There is "no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res judicata.*" *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1980).

(g) The Courts' holding that constructive notice was sufficient, and that the burden of proof was on Petitioners, is contrary to fact and law.- The courts' finding of "constructive notice" through notice of seizure served on M. Comer *(App. A at 3)* has no legal support. She was ***never*** part of Osa or Burica and, thus, even "constructive receipt" did not occur. The only notice served on M. Comer involved real estate owned by the Comer Trust. No notice of any kind was ever served on Petitioners concerning seizure of their bank accounts *(AB at 35; ARB at 22)* as mandated by law. *IRC §§ 6332, 6335(a); Reg. § 301.6335-1(a); Goodwin v. U.S.*, 935 F.2d 1061, 1065 (9th Cir. 1991); *Phelps v. U.S.*, 421 U.S. 330 (1975); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313-314, 320 (1949).

The Court's finding that *Century Hotels v. U.S.*, 952 F.2d 107, 109 (5th Cir. 1992) requires shifting the burden of proof to Plaintiffs *(App. A at 4)* is misplaced, and contravenes the law of this circuit and this Court. In *Century*, the court held that to shift the burden IRS must show by "substantial evidence" that it was entitled to maintain its levy. This substantial burden was ***not*** met in this case. *Certain Parcel of Land*, supra at 1298.

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18 *Reynolds v. C.I.R.*, 861 F.2d 469, 473-474 (6th Cir. 1988). See *David Krueger*, 48 TC 824, 829-830 (1967). (Stipulated Decision is binding). *See, United States v. Wynshaw*, 516 F.Supp. 785, 788-789, aff'd 697 F.2d 85 (2d Cir. 1983), cer. den. 464 U.S. 822; *Lenny v. Williams*, 143 F.Supp. 29, 34 (ND OH. 1956); *United States v. Brown*, 86 F.2d 798 (6th Cir. 1936); *Estate of Johnson v. Comm.*, 88 TC 225, 231, 233, aff'd 838 F.2d 1202 (2nd Cir. 1987).

Speiser v. Randall, 357 U.S. 513, 529 (1953); *Smith v. C.I.R.*, 926 F.2d 1470 (6th Cir. 1991); *U.S. v. Walton*, 909 F.2d 915 (6th Cir. 1990); *Weir v. C.I.R.*, 283 F.2d 675 (6th Cir. 1960) (All holding that Plaintiffs' denial of the correctness of IRS's actions is sufficient to maintain the burden on IRS.)

V. Conflict with State Law.

The decision is in direct conflict with Michigan statutes and related State judicial holdings, as well as related decisions of the Second, Third, Fifth, Eighth, Ninth and District of Columbia Circuits and this Court, concerning: (a) requirements of substantial evidence *(Infra, pps. 4-9, 14-19, 22);* (b) burden of proof *(Infra, pps. 7-9, 17-19, 22);* (c) binding reformation of trusts *(Infra, pps. 6, 8, 15);* (d) fraudulent conveyances and insolvency *(Infra, pps. 4-7, 14-16, 19-24);* and alter ego status *(Infra, pps. 8-9, 11-13, 24-27).*

VI. Conflict with Prior Sixth Circuit Decisions.

The decision conflicts with State and Federal statutes and is contrary to prior holdings of this Circuit concerning: (a) rules of substantial evidence and burden of proof *(Infra, pps. 14-19, 24-25, 29);* (b) post trial new theories and allegations *(Infra, p. 20-21);* (c) fraudulent conveyances and insolvency *(Infra, pps. 16, 20-24);* (d) alter ego status *(Infra, pps. 20, 24-27);* (e) statutes of limitation *(Infra, p. 13);* (f) res judicata and estoppel *(Infra, p. 28);* (g) proper notice *(Infra, pps. 28-29);* and partnership law *(Infra, p. 18).*

VII. Conflicts with Other Circuits and the Supreme Court.

The decision conflicts with related decisions of the First, Second, Third, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits and of this Court concerning: (a) rules of substantial evidence and burden of proof *(Infra, pps. 14-19, 25, 29);* (b) post trial new allegations and theories *(Infra, pps. 19-21);* (c) fraudulent conveyances and insolvency *(Infra, pps. 15, 19-23);* (d) alter ego status *(Infra, pps. 21, 24-27);* (e) statutes of limitation *(Infra, p. 4-7, 9, 13-14);* (f) res judicata and estoppel *(Infra, p. 9, 28);* and proper notice *(Infra, p. 9, 28-29).*

VIII. Constitutional Principles.

Based upon the foregoing, the decision clearly contravenes established State and Federal law, constitutes a taking of Petitioners' properties in violation of their Fifth Amendment

rights, and involves an absence of due process which requires the presence of the "rudiments of fair play" and an absence of a "one-sided determination of facts decisive of rights." *Dation v. Ford Motor Co.*, 314 Mich 152, 163-167 (1946); *Convalescent Center v. Blue Cross*, 414 Mich 247, 261 (1982). Due process of law requires the protection and enforcement of private rights." *Endicott Co. v. Encyclopedia Press.*, 266 U.S. 285, 288 (1924). "The federal sovereign . . . must govern impartially." *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1975). A decision contrary to state law violates Petitioners due process rights and, thereby, the Constitution of the United States *(Thompson v. Auditor General*, 261 Mich. 624, 654 (1933)), and "is arbitrary and deprives the [Petitioners] of property without due process." *Helvering v. City Bank Co.*, 296 U.S. 85, 89 (1935). Without question, the Fifth Amendment "rights of private property owners . . . must be respected and protected." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1971). Certiorari should be granted to resolve the contravention of State and Federal statutes and the conflict in the Circuits created by the Court of Appeals and to provide uniform guidance to taxpayers, and third parties like Petitioners, on these important property rights issues.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

October 28, 1992

No. 90-1406

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM L. COMER FAMILY EQUITY PORE TRUST, Myra L. Comer, Trustee; AMERICAN WAY TRUST, Myra L. Comer, Trustee; FINANCIAL FREEDOM CONSULTANTS, William L. Comer, Trustee; OSA DEVELOPMENT COMPANY, with OSA Explorations as General partner, William L. Comer, Trustee; BURICA DEVELOPMENT COMPANY, with Burica Explorations as General Partner, William Comer, Trustee,

Plaintiffs-Appellants,

v.

INTERNAL REVENUE SERVICE; UNITED STATES OF AMERICA,

Defendants-Appellees.

FILED
JUN 22 1992
Leonard Green, Clerk

ORDER

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

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BEFORE: MARTIN and SUHRHEINRICH, Circuit Judges, and WELLFORD, Senior Circuit Judge.

The plaintiffs in this case, three trusts and two limited

partnerships, appeal the district court's judgment for the defendants in their wrongful levy action brought pursuant to 26 U.S.C. § 7426(a)(1). This case has been referred to a panel of the court pursuant to Rule 9(a), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a). In addition, attorneys for both sides have waived oral argument in their appellate briefs.

The plaintiff trusts ("Comer Trust", "American Trust", and "Financial Trust") are irrevocable living trusts established under the laws of Michigan by William L. Comer as grantor. William L. Comer, his wife, Myra L. Comer, and sons William R. and Scott C. Comer each acts as trustee for one or more of the trusts. Each trust holds property under its own name and has filed separate fiduciary tax returns for both Michigan and federal taxes. The plaintiff limited partnerships ("OSA" and "Burica") were each established with an irrevocable business trust as general partner; William L. Comer is trustee of each business trust. Each partnership has filed separate state and federal tax returns.

On or about February 12, 1987, the IRS served William and Myra Comer with a notice of seizure pertaining to real property held by the Comer Trust. That same day, the IRS served a notice of levy upon the Farwell State Savings Bank, levying upon all the assets held with the bank by the Comer Trust, American Trust, Financial Trust, OSA, and Burica. These levies and/or seizures were brought in attempted satisfaction of over $250,000 in income tax deficiencies assessed against William and Myra Comer for the tax years ending 1976 through 1980, and 1985.

The plaintiffs thereupon brought this action seeking an injunction against the disposition or sale of the property subject to seizure, a court order returning the property to the plaintiffs, and a judgment for the amount of any property sold. Following a one-day bench trial, the district court found that the plaintiffs are alter egos of William and Myra Comer, that under Michigan law they cannot assert ownership of the levied-upon property, and that they thus lack standing to challenge the levies. The district court accordingly entered judgement for the defendants on February 16, 1990.

On appeal, the plaintiffs raise six alleged errors: (1) the district court erred by allowing the IRS to raise new issues at trial; (2) the district court's decision was not supported by the evidence, was contrary to law, and improperly placed the burden of proof on the plaintiffs; (3) the district court erred in its rulings on service of notice to the plaintiffs, statute of limitations, and the effect of a stipulation agreement covering the 1981 tax year; (4) the district court erred by failing to examine each entity independently of the others; (5) the district court erred in finding the taxpayers were engaged in fraudulent conveyances; and (6) the plaintiffs received ineffective assistance of counsel.

Upon review, we affirm the district court's judgment because its decision was supported by the evidence and the other issues on appeal are without merit.

The plaintiffs' first issue on appeal is meritless because there was no new issue raised after trial which was not contemplated by the recognized issue of whether the plaintiffs are the alter egos of William and Myra Comer. The alter ego issue was clearly set out in the joint pretrial order submitted by the parties.

The plaintiffs also argue that the district court erred in its rulings regarding service of notice, statute of limitations, and the effect of the stipulation agreement. As the nominal owners of the property levied upon, the plaintiffs were entitled to notice of seizures of the property. *See* 26 U.S.C. § 6335(a); *Valley Finance, Inc.v. United States*, 629 F.2d 162, 170 (D.C. Cir. 1980), *cert. denied,* 451 U.S. 1018(1981). However, the district court correctly found that each of the plaintiffs received constructive notice through the notice served upon Myra Comer at the address which the Comers shared with each of the plaintiffs. Moreover, the finding that the plaintiffs are merely alter egos of the Comers supports the conclusion that service of the notice upon the Comers *was* service upon the plaintiffs.

The one-year statute of limitations argued by the plaintiffs is inapplicable to this case. That statute applies only to transfers of property to a third party and certain fiduciaries. *See* 26 U.S.C. § 6901(c). The government's evidence established that the plaintiffs are not transferees or genuine fiduciaries, but are alter egos. Under the six-year limitations period provided by the applicable section, 26 U.S.C. § 6502, the levies were timely served. The district court also properly held that, because there was no judg-

ment on the merits, the stipulation agreement pertaining to another tax year does not have preclusive effect on this action. *See In re Long Distance Telecomm. Lit.*, 831 F.2d 627, 635 (6th Cir. 1987).

Contrary to the plaintiffs' assertion, the district court's decision shows that the court *did* examine each entity independently of the others.

The district court's finding that the taxpayers engaged in fraudulent conveyances is not clearly erroneous. *See Thompson v. Commissioner*, 631 F.2d 642, 646 (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981). The record supports the district court's finding that these conveyances contain "badges of fraud" under both state and federal tax law.

In order to prove that a tax levy was wrongful, the person or entity challenging the levy must initially show some interest in the property in order to establish standing. Once this initial showing is made, the IRS must prove by substantial evidence a nexus between the funds and the taxpayer. If the IRS meets this burden, then the entity challenging the levy has the ultimate burden of providing the levy was wrongful. *See Century Hotels v. United States*, 952 F.2d 107, 109 (5th Cir. 1992).

If the plaintiffs are the alter egos of Comer and his wife, the IRS may properly regard the plaintiffs' property as the Comers' assets subject to levy in satisfaction of their tax liabilities. *See G.M. Leasing Corp v. United States*, 429 U.S. 338, 351 (1977); *F.P.P. Enterprises v. United States*, 830 F.2d 114, 118 (8th Cir. 1987).

Whether an entity is the alter ego of a taxpayer is a question of fact subject to the clearly erroneous standard. *See Century Hotels*, 952 F.2d at 112. Upon review of the record, we conclude that neither the district court's finding of alter ego status nor its conclusion that the plaintiffs lack standing to enjoin the United States from levying the disputed property is clearly erroneous or contrary to law.

The plaintiffs' final issue, claiming ineffective assistance of counsel, it totally frivolous. It is well settled that there is no constitutional or statutory right to effective assistance of counsel in a civil case. *See, e.g., Friedman v. Arizona*, 912 F.2d 328,

333 (9th Cir. 1990), *cert. denied,* 111 S. Ct. 996 (1991); *Glick v. Henderson,* 855 F.2d 536, 541 (8th Cir. 1988); *MacCuish v. United States,* 844 F.2d 733, 735 (10th Cir. 1988).

Accordingly, the district court's judgment, entered february 16, 1990, is affirmed. Rule 9(b)(3), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk.

WILLIAM L. COMER FAMILY EQUITY TRUST, Myra L. Comer, Trustee; American Way Trust, Myra L. Comer, Trustee; Financial Freedom Consultants, William L. Comer, Trustee; OSA Development Company with OSA Explorations as General Partner, William L. Comer, Trustee; Burica Development Company, with Burica Explorations as General Partner, William Comer, Trustee, Plaintiffs,

v.

**UNITED STATES of America,
Defendant.**

No. 87-CV-30092 PH.

United States District Court,
E.D. Michigan, S.D.

Feb. 16, 1990.

Trusts purportedly holding assets of taxpayers brought action asserting that Internal Revenue Service in attempting satisfaction of income tax deficiencies owed by taxpayers levied against property owned by trusts as third parties. The District Court, James Harvey, J., held that trusts lacked standing to challenge Internal Revenue Service levies.

Judgment for defendant.

1. Internal Revenue — 4857

Generally, Government may levy against only property owned by pertinent taxpayer, and not against any third party's property.

2. Internal Revenue — 4857

Individual or entity challenging Internal Revenue Service levy of property bears initial burden of proving some interest in levied-upon property. 26 U.S.C.A. § 7426.

3. Internal Revenue — 4857

Plaintiffs which fail to introduce any evidence concerning any interest in property levied upon by Internal Revenue Service lacks standing to challenge Government's levies. 26 U.S.C.A. § 7426.

4. Corporation — 1.4(4)

Where corporation is mere agent or instrumentality of its shareholders or device to avoid legal obligations, corporate entity may be ignored.

5. Corporations — 1.6(3)

In determining whether to disregard corporate entity for purposes of ascertaining debt liability, courts look to amount of respect given to separate entity of corporation by its shareholders, degree of injustice visited on litigants by recognition of corporate entity, and fraudulent intent of incorporators with factors too be considered including undercapitalization, maintenance of separate books, separation of corporate and individual finances, use of corporation to support fraud or illegality, honoring of corporate formalities, and whether corporation is merely a sham; the factors are not all inclusive and entire spectrum of relevant facts forms basis for any inquiry, and facts are to be assessed in light of corporation's economic justification to determine if corporate form has been abused.

6. Internal Revenue — 4858

Trust purportedly holding assets of taxpayers could not, under Michigan law, assert ownership of levied-upon property and, thus, lacked standing to challenge Internal Revenue Service levies of the property; close examination of trusts' relationships demonstrated that their sole function was to manipulate taxpayers' income and assets which had been transferred to trusts.

7. Internal Revenue — 4788

Service of notice of levy need not be made upon potential third-party owners of levied-upon potential third-party owners of levied-upon property to satisfy notice provisions of federal tax law.

Peter C. Jensen, Saginaw, Mich., for plaintiffs.

Michael Hluchaniuk, Bay City, Mich., Tom Clark, Tax Div., Justice Dept., Washington, D.C., for defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

JAMES HARVEY, District Judge.

This is a wrongful levy action brought to 26 U.S.C. § 7426. The plaintiffs assert that the Internal Revenue Service (IRS), in attempting satisfaction of income tax deficiencies owed by William L. and Myra Comer, levied against property owned by the plaintiffs. The government, conversely, contends that the plaintiffs are merely the "alter ego" of the taxpayers, and that therefore the IRS properly levied against the relevant property. The court's sole function is to therefore determine, for purposes of the challenged levy, the ownership of the property at issue. The parties presented their proofs in a one day bench trial; the Court now offers its findings of fact and conclusions of law. Fed.R.Civ. P.

I. FINDINGS OF FACT

1. Myra and William L. Comer are husband and wife, residing in Clare, Michigan.

2. On January 17, 1975, William L. Comer, as grantor, created the William L. Comer Family Equity Pure Trust (hereafter Family Trust), naming Myra Comer and Phyllis Carrow as original trustees. Phyllis Carrow is William L. Comer's mother.

3. The Declaration of Trust included a conveyance from William L. Comer to the Family Trust of the exclusive use of William L. Comer's "lifetime services" and all of his "earned remuneration."

4. The Declaration of Trust does not name beneficiaries; instead, the declaration creates "beneficial interest" certificates such that beneficiary status is determined by ownership of such certificates.

5. On January 23, 1975, by quit claim deed, Myra Comer conveyed all of her interest in real property located at 3261 E. Colonville Road, Clare, Michigan (hereafter 3261 property) to William L. Comer.

6. On January 23, 1975, Myra Comer assigned to William

L. Comer all of her interest in the land contract related to the 3261 property.

7. On January 23, 1975, William L. Comer, by quit claim deed, conveyed the 3261 property to the Family Trust.

8. On January 23, 1975, William L. Comer assigned the land contract related to the 3261 property to the Family Trust.

9. On January 23, 1975, William L. Comer, by "bill of sale" indicating $10.00 in consideration, conveyed to the Family Trust the following property:

a. 3261 property;

b. 1000 shares of Solarmatics, Inc., stock;

c. Three insurance policies;

d. Accounts at two banks;

e. Constitution Enterprises, a dehydrated food business;

f. Numerous household furnishings.

10. The property referenced in finding 9 represented virtually all of William L. and Myra Comer's tangible assets as of January 23, 1975.

11. At some point following Family Trust's creation, Phyllis Carrow resigned as trustee, and William L. Comer became trustee.

12. On May 17, 1976, the trustees amended the Family Trust to make it expressly irrevocable.

13. On December 1, 1978, the Family Trust purchased, by land contract, real property located at 9260 Colonville Road, Clare, Michigan (hereafter 9260 property), from Jerry and Pamela Trask. The Family Trust paid $10,000.00 of the $64,000.00 purchase price up front. William L. and Myra Comer signed the land contract as trustees of the Family Trust.

14. The IRS levied on the 9260 property, and this property remains the residence of William L. and Myra Comer.

15. On August 19, 1980, the Family Trust was amended. Under the amendment, the grantor, William L. Comer, became the initial sole beneficiary of the trust. Other beneficiaries approving the amendment included Scott Comer, William R. Comer, Myra Comer, and the Mount Zion Constitutional Fund, a trust created by William L. and Myra Comer.

16. On September 25, 1981, the Family Trust sold 8.8 acres of the 3261 property to Byron Benchley.

17. On May 25, 1982, the Family Trust, by land contract, sold to Carl Koehn, Winnifred Koehn, and Arvilla Wiswary 3.2 acres of the 3261 property.

18. On November 1, 1976, the Family Trust, as grantor, created Try Refining Your Education—A Trust (hereafter TRYE Trust), an irrevocable trust, naming William L. and Myra Comer as trustees.

19. On November 1, 1976, the Family Trust, by Bill of Sale, conveyed to the TRYE Trust all of its accounts receivable dating from November 1, 1976, a checking account at the Farwell State Savings Bank, and a business known as T.R.Y.E.—A Trust.

20. On January 1, 1980, the Family Trust leased the 9260 property to the TRYE Trust for $650.00 per month. Although William L. Comer is designated as trustee for the Family Trust in the lease recitals, William R. Comer signed the lease in that capacity.

21. On June 1, 1980, the TRYE Trust entered into an employment contract with William L. Comer, naming William L. Comer "Executive Trustee." In consideration of his performance of the Executive Trustee's duties, William L. Comer received a salary of $10,200.00 per year, housing, and transportation. William L. Comer signed the employment contract both as trustee for the TRYE Trust and as the contractor.

22. On July 8, 1980, the TRYE Trust was amended to provide, among other things, that the grantor was the initial and sole beneficiary of the trust. At the time of the amendment, no existing beneficiaries formally approved the amendment.

23. On January 19, 1977, William L. Comer, as grantor,

created an irrevocable trust, the American Way Trust (hereafter American Trust), naming William R. and Myra Comer as original trustees.

24. On January 19, 1977, by Bill of Sale, William L. Comer conveyed to the American Trust the following property:

a. 1977 Buick Riviera

b. 1977 Dodge Van

c. William L. Comer's $5378,40 personal note to the TRYE Trust.

25. On January 19, 1977, the American Trust leased to the TRYE Trust the following property:

a. 1977 Buick Riviera

b. 1977 Dodge Van

c. 1978 Buick Riviera

d. 1979 Oldsmobile 98

e. 1979 Avanti

Although William L. Comer was not designated a trustee in the American Trust's Declaration of Trust, William L. Comer signed the lease agreement in this capacity.

26. On August 25, 1980, William R. Comer was appointed trustee of the American Trust, notwithstanding the fact that he was designated as such in the Declaration of Trust.

27. On August 27, 1980, the American Trust was amended to provide, among other things, that the grantor was initial and sole beneficiary of the trust. William L. and Myra Comer signed the amendment as trustees; William R., Scott, and Myra approved the amendment as beneficiaries.

28. On September 25, 1981, William L. Comer resigned as trustee of the American Trust.

29. On January 23, 1984, Scott Comer was appointed as

trustee of the American Trust.

30. Sometime in late 1983 or early 1984, the American Trust purchased a used Lincoln Continental, with Myra Comer signing the purchase agreement as trustee for the American Trust.

31. On February 1, 1982, William L. Comer, as grantor, created an irrevocable trust, Financial Freedom Consultants (hereafter FFC), naming William L. and Scott Comer as trustees.

32. Under FCC's Declaration of Trust, the grantor was sole beneficiary of the trust. Because the declaration precluded beneficiaries form participating in the management or affairs of FFC, William L. Comer, as grantor, trustee, and sole beneficiary of FFC transferred his beneficial interest in FFC to the Family Trust.

33. On February 1, 1982, William L. Comer conveyed, by Bill of Sale, one hundred dollars in cash to FFC in consideration of one hundred dollars received from FFC, ostensibly for the purpose of opening a bank account on FFC's behalf.

34. Sometime in 1982, the TRYE Trust ceased operations. Thereafter, FFC leased the 9260 property from the Family Trust.

35. On August 10, 1984, William L. Comer received, by certified mail, a notice of tax deficiency from the IRS in the amount of $187,122.10. This notice pertained to tax years 1975, 1976, 1977, 1978, 1979 and 1980.

36. On October 19, 1984, the IRS filed a notice of tax lien with the Register of Deeds for Clare County, Michigan indicating a lien against all of William L. and Myra Comer's property rights in the amount of $149,125.54, reflecting claimed deficiencies for tax years 1977, 1978, and 1979.

37. On February 13, 1987, the IRS served a notice of seizure upon the "William L. Comer Family Equity Pure Trust, as Nominee, Transferee, or Alter Ego of William L. Comer and Myra L. Comer." This notice pertained to the 9260 property held in trust by the Family Trust.

38. On or about February 13, 1987, the IRS served a notice of levy upon the Farwell State Savings Bank, thereby levying upon all the assets of the Family Trust, the American Trust,

FFC, Burica Development Company, and OSA Development Company all as alleged nominees, alter egos or transferees of William L. and Myra L. Comer.

39. At all times relevant to this action, William L. and/or Myra L. Comer owned not certificates of deposit, stock, bonds, or other investments in their individual or joint names.

40. At all times relevant to this action, William L. and/or Myra L. Comer owned no real property in their individual or joint names.

41. All named plaintiffs maintained separate employer identification numbers.

42. Each plaintiff maintained separate bank accounts.

43. All trusts in issue herein were filed with the Clare County, Michigan Probate Court and any and all amendments to the trusts were made pursuant to order of the Clare County, Michigan, Probate Court.

II. CONCLUSIONS OF LAW

1. Jurisdiction lies in this Court under 28 U.S.C. § 1346.

[1.] 2. Generally, the government may levy against only property owned by the pertinent taxpayer, and not against any third party's property. *United States v. Kaufman*, 267 U.S. 408, 45 S.Ct. 322, 69 L.Ed. 685 (1925).

3. If an individual or entity believes that the government has wrongfully levied against its property, the individual or entity may challenge the levy pursuant to 26 U.S.C. § 7426. The critical issue in a § 7426 action is, therefore, whether the entity bringing the action, and not the taxpayer, owns the levied-upon property. *Shannon v. United States*, 521 F.2d 56 (9th Cir.1975), *cert. denied*, 424 U.S. 965, 96 S.Ct. 1458, 47 L.Ed.2d 731 (1976).

[2,3] 4. Section 7426 plaintiffs bear the initial burden of proving some interest in the levied-upon property. *Morris v. United States*, 813 F.2d 343, 345 (11th Cir. 1987). Neither Burica Development Company nor OSA Development Company introduced any evidence at trial concerning any interest in

levied-upon property. These plaintiffs are therefore dismissed due to lack of standing to challenge the government's levies.

5. "Generally state law controls the determination of the nature and extent of the taxpayer's property interests in any given property." *James E. Edwards Family Trust by Edwards v. United States,* 572 F.Supp. 22, 24 (E.D.N.M.1983) (citations omitted).

6. Courts have also, however, referenced federal tax law in evaluating property ownership for § 7426 purposes. *Edwards, supra.*

7. This Court must therefore determine whether, under Michigan law, the Family Trust, the American Trust, and FFC should be considered owners of the 9260 property and three Farwell State Savings Bank accounts levied-upon by the government.

8. In *Loving Saviour Church v. United States,* 728 F.2d 1085 (8th Cir.1984), the court sustained the district court's application of South Dakota fraudulent conveyance and "alter ego" law in rejecting an unincorporated religious association as the owner of certain realty and personalty for § 7426 purposes. The district court initially found that because the taxpayers possessed and controlled the property at issue, the asserted transfers of the property to the plaintiff church "were a sham, constituted a fraudulent conveyance, and may be levied upon to satisfy" the relevant tax liability. 728 F.2d at 1086, citing *Carr Enterprises, Inc. v. United States,* 539 F.Supp. 528 (D.S.D.1982), *aff'd,* 698 F.2d 952 (8th Cir.1983).

Next, the district court examined several factors, including the following, in concluding that the plaintiff was merely the alter ego of the taxpayers, and therefore lacking § 7426 standing: (1) the treatment by the taxpayers of the plaintiff's assets as their own; (2) the control of the plaintiff by the taxpayers and their family alone; (3) the use of plaintiff's funds to pay the taxpayers' personal expenses; ($) transference of property from the taxpayers to the plaintiff for little or no consideration; and (5) the fact that the plaintiff fully supported the taxpayers in the style of their choosing. 728 F.2d at 1086.

9. Under Michigan law, "[e]very conveyance made . . . with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors." Mich. Comp. Laws Ann. § 566.17. In evaluating the legitimacy of property transfers, Michigan courts may look to "badges of fraud" in determining whether intent to defraud exists, *Farrell v. Paulus,* 309 Mich. 441, 450, 15 N.W.2d 700 (1944). Such badges involve a consideration of circumstances surrounding the pertinent transaction. In *Farrell,* the court in setting aside certain conveyances, noted that the challenged transactions left the transferor virtually insolvent, occurred between family members, involved little or no consideration, and that despite the conveyances, the transferor continued using the property at issue. *Id.* at 450, 451, 15 N.W.2d 700.

[4,5] 10. While the Court uncovered no precedent analyzing the "alter ego" theory of property ownership in the context of a trust, cases involving corporate entities provide appropriate guidance. Essentially, "[w]here [a] corporation is a mere agent or instrumentality of its shareholders or a device to avoid legal obligations, the corporation entity may be ignored." *Kline v. Kline,* 104 Mich.App. 700, 702, 305 N.W.2d 297 (1981), citing *People ex rel. Attorney General v. Michigan Bell Telephone Co.,* 246 Mich. 198, 205, 224 N.W. 438 (1929). In determining whether to disregard a corporate entity for purposes of ascertaining debt liability, court look to

> (1) the amount of respect given to the separate entity of the separate entity of the corporation by its shareholders; (2) the degree of injustice visited on the litigants by recognition of the corporate entity; and (3) the fraudulent intent of the incorporators. []. Factors to be considered include undercapitalization of the corporation, the maintenance of separate books, the separation of corporate and individual finances, the use of the corporation to support fraud or illegality, the honoring of corporate formalities, and whether

the corporation is merely a sham. [].

Laborers' Pension Trust Fund v. Weinberger Homes, Inc., 872 F.2d 702, 704-705 (6th Cir.1988), citing *Contractors, Laborers, Teamsters & Engineers Health Plan v. Hroch*, 757 F.2d 184, 190 (8th Cir.1985) (further citations omitted). The above factors are not, however, all-inclusive, and "[t]he entire spectrum of relevant fact forms the background for such an inquiry, and the facts are to be assessed in light of the corporation's economic justification to determine if the corporate from has been abused." *Bodenhamer Building Corp. v. Architectural Research Corp.*, 873 F.2d 109, 111 (6th Cir.1989), quoting *Klager v. Robert Meyer Co.*, 415 Mich. 402, 329 N.W.2d 721 (1982).

[6] 11. Indicia of improper property transfers, in light of the foregoing, exist in the present case. William L. and Myra L. Comer (Mr. and Mrs. Comer) transferred essentially all of their real and personal property, as well as all of Mr. Comer's future earnings, to the Family Trust in exchange for paltry consideration. Subsequent to this transfer, the Comers were, for all intents and purposes, insolvent. Thereafter, the Family Trust sold to third parties the original realty conveyed to the trust, while purchasing the 9260 property, levied-upon by the IRS and material to this action. The Comers continue to live in the 9260 property, and are therefore using the property as their own. Similarly, all of the property conveyed to the American Trust and to FFC originated with either Mr. Comer or the Family Trust, and the Comers continue to use such property. The "lease" of the 9260 property by FFC from the family Trust, ostensibly as part of Mr. Comer's compensation as Executive Trustee of FFC, is of no consequence. The Court views any and all transactions between Comer-created trusts, or between the trusts and Mr. or Mrs. Comer, as legal nullities, effectively no more substantial than the intra-family transactions condemned in *Farrell*. No serious argument can be propounded that "arms-length" negotiations occurred between any of these entities respecting any lease or loan transaction when the grantors, trustees, and beneficiaries of the trusts are, without exception, Comer family members. Several instances concerning the signing of documents on behalf of the trusts demonstrate the Comers' disregard of each trust's legal form; the lease agreement between family Trust and TRYE Trust is signed by William R. Comer as Family Trust's trustee, when he possessed

no such capacity, and Mr. Comer signed a vehicle lease agreement as trustee of the American Trust on the date of its formation despite the fact that the declaration of trust identified only William R. and Myra Comer as American's trustees. Perhaps even; more illustrative of the Comers' disregard of each trust's independent identity was Mr. comer's response when queried about a possible conflict between his serving as Executive Trustee of TRYE Trust given the conveyance to the Family Trust of all of his lifetime services: Mr. Comer simply asserted that he ignored the relevant language in the Family Trust's Declaration of Trust. Finally, and importantly, Mr. Comer offered no convincing evidence at trial indicating any independent economic purpose for the existence of any of his trusts. Close examination of the trusts' relationship demonstrates that their sole function is to manipulate the Comers' income and assets. The Court therefore concludes that, under Michigan law, the plaintiffs cannot assert ownership of the levied-upon property, and therefore lack standing to challenge the relevant levies.

12. The plaintiffs additionally argue that the IRS' assessments against the Comers are barred due to expiration of the statute of limitations. This argument, however, ignores the established principle that in § 7426 actions, the underlying tax assessment is presumed valid, and such assessment can only be challenged by the relevant taxpayer. *Rabinof v. United States,* 329 F.Supp. 830 (S.D.N.Y.1971); *Shannon v. United States,* 521 F.2d 56 (9th Cir.1975), *cert. denied,* 424 U.S. 965, 96 S.Ct. 1458, 47 L.Ed.2d 731 (1976). Since plaintiffs are not the relevant taxpayer, this claim is rejected.

[7] 13. 0The plaintiffs' notice of levy argument is also defective. Service of notice of levy need not be made upon potential third party owners of levied-upon property to satisfy the notice provisions of the federal tax law. *Douglas v. United States,* 562 F.Supp. 593 (S.D.Ga.1983). Moreover, as the IRS served proper notice of levy regarding the 9260 property upon the Comers, the plaintiffs received a minimum constructive notice of this levy.

14. Finally, plaintiffs urge that the government is precluded from levying against the property at issue under the doctrines of res judicata, estoppel, and elections. This contention is derived

from certain agreements between the Comers, the plaintiffs, and the IRS concerning tax liabilities for the years 1982 and 1983. Essentially, plaintiffs assert that these agreements, in that they reflect no tax liability on the plaintiffs' behalf for the pertinent years, prevent the government from thereafter attempting to assign tax liability against the plaintiffs. Thus, plaintiffs argue, the government improperly levied against the property at issue in this case.

This Court's finding, reflected in this opinion, that the Comers own the property at issue for tax levy purposes renders the plaintiffs' final argument ineffective. Because plaintiffs have failed to demonstrate the required interest in the pertinent property, they cannot now claim that the government is violating the terms of an agreement allegedly absolving the plaintiffs from future tax liability. Simply put, the plaintiffs cannot assert any detriment from the government levying on someone else's property.

III. CONCLUSION

Based upon the preceding, the Court finds for the defendant, sustains the levies at issue, and ORDERS that the plaintiffs take nothing. Judgment shall enter accordingly.

IT IS SO ORDERED.

JUDGMENT IN A CIVIL CASE

United States District Court

EASTERN DISTRICT OF MICHIGAN

Case Title — WILLIAM L. COMER, et al., Plaintiffs,

v.

USA, Defendant.

Docket Number 87-CV-30092 PH

Name of Judge or Magistrate — JAMES HARVEY

Decision by Court. This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that plaintiffs take nothing and that this case be dismissed.

FILED
FEBRUARY 16, 1990
U.S. DISTRICT COURT

CLERK — DAVID R. SHERWOOD

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

WILLIAM L. COMER FAMILY EQUITY PURE TRUST, Myra L. Comer, Trustee; COURT **AMERICAN WAY TRUST**, Myra L. Comer, Trustee; **FREEDOM FINANCIAL CONSULTANTS**, William L. Comer, Trustee; **OSA DEVELOPMENT COMPANY**, with OSA Explorations as General Partner, William L. Comer Trustee; **BURICA DEVELOPMENT COMPANY**, with BURICA Explorations as General Partner, William L. Comer Trustee,

Plaintiffs,

v.

INTERNAL REVENUE SERVICE, AND **UNITED STATES OF AMERICA**,

Defendants

FILED
DECEMBER 3, 1991
U.S. DISTRICT COURT

MEMORANDUM AND ORDER

Plaintiff trust funds brought suit against the United States in this Court, alleging that the Internal Revenue Service, in seeking to satisfy income tax deficiencies owed by William L. and Myra L. Comer (the Comers), wrongfully levied upon property owned by plaintiffs. Following a bench trial, the Court ruled for defendants, holding that plaintiffs were the "alter egos" the Comers. *William L. Comer Family Equity Trust v. United States*, 732 F. Supp. 755 (E.D. Mich. 1990). Plaintiffs, which have appealed the Court's ruling, now move the Court under Rule 10(e) of the Federal Rules of Appellate Procedure to modify the record.

Plaintiffs seek to supplement the record with approximately 161 pages of documents. First, they assert that some of the pages—proposed exhibit FF-1—were "supposedly entered into

the record, [but] failed to so appear for reasons unknown to plaintiffs." Plaintiff-Appellants' Reply to Defendants' Response, at 3. Second, they contend that defendants deceived them, representing that certain documents would be submitted at trial, yet failing to submit the documents. Finally, plaintiffs request that the Court allow additional evidence into the record because defendants raised new legal theories after trial, for which plaintiffs had not prepared.

Rule 10(e) requires that "[i]f any difference arises as to whether the record truly discloses what occurred in the district court, the difference shall be submitted to and settled by that court and the record made to conform to the truth." Thus, the purpose of Rule 10(e) is to allow a district court to correct omissions form or misstatements in the record, not to introduce new evidence. *S & E Shipping Corp. v. Chesapeake & O. Ry.*, 678 F.2d 636, 641 (6th Cir. 1982).

With regard to plaintiffs' first contention, the Court sees no reason to allow plaintiffs to supplement the record by adding proposed exhibit FF-1. The Court recalls no effort by plaintiffs at trial to submit proposed exhibit FF-1 into evidence. Plaintiffs' carelessness in failing to ensure that documents purportedly favoring their interests were admitted into evidence does not justify allowing them to reopen the record after the Court rules against them.

Similarly, the Court finds no merit to plaintiffs' second contention. Essentially, plaintiffs argue that they should be allowed to reopen the record to submit new evidence because they thought that defendants would submit such evidence at trial. As noted, Rule 10(e) does not allow a party to supplement the record with new evidence; it merely allows a party to correct errors in the record, so that the record reflects accurately the events at trial. *S & E Shipping Corp.*, 678 F.2d at 641.

Finally, the Court also rejects plaintiffs' contention that defendants raised new legal theories after trial, allegedly surprising plaintiffs. The Court notes that defendants raised no new or novel theories after trial that were not within the parties' contemplation through pretrial proceedings and throughout trial.

Accordingly, plaintiffs' motion to modify the record is

DENIED.

Dated: 12/3/91

James Harvey
United States District Judge

E-23

No. 90-1406
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM L. COMER FAMILY EQUITY TRUST, et al.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee.

FILED
JUL 30 1992
Leonard Green, Clerk

ORDER

BEFORE: MARTIN and SUHRHEINRICH, Circuit Judges; and WELLFORD, Senior Circuit Judge.

Upon consideration of the motion for reconsideration filed herein by the appellants, the Court concludes that the issues raised were fully considered upon the original submission and decision of this case.

IT IS THEREFORE ORDERED that the motion for reconsideration be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN
Clerk

TREASURY REGULATIONS

Section 301.7701-4. Trusts.

(a) *Ordinary trusts.* In general, the term "trust" as used in the Internal Revenue Code refers to an arrangement created either by a will or by an inter vivos declaration whereby trustees take title to property for the purpose of protecting or conserving it for the beneficiaries under the ordinary rules applied in chancery or probate courts. Usually the beneficiaries of such a trust do no more than accept the benefits thereof and are not the voluntary planners or creators of the trust arrangement. However, the beneficiaries of such a trust may be the persons who create it and it will be recognized as a trust under the Internal Revenue Code if it was created for the purpose of protecting or conserving the trust property for beneficiaries who stand in the same relation to the trust as they would if the trust had been created by others for them. Generally speaking, an arrangement will be treated as a trust under the Internal Revenue Code if it can be shown that the purpose of the arrangement is to vest in trustees responsibility for the protection and conservation of property for beneficiaries who cannot share in the discharge of this responsibility and, therefore, are not associates in a joint enterprise for the conduct of business for profit.

(b) *Business trusts.* [IN PERTINENT PART] There are other arrangements which are known as trusts because the legal title to property is conveyed to trustees for the benefit of beneficiaries, but which are not classified as trusts for purposes of the Internal Revenue Code because they are not simply arrangements to protect or conserve the property for the beneficiaries. These trusts, which are often known as business or commercial trusts, generally are created by the beneficiaries simply as a device to carry on a profit-making business which normally would have been carried on through business organizations that are classified as corporations or partnerships under the Internal Revenue Code...